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FOURTH TRIENNIAL REPORT

OF THE

PROVINCIAL JUDGES

REMUNERATION COMMISSION

(1998)

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IN THE MATTER OF THE COURTS OF JUSTICE ACT AND IN THE MATTER OF
AN INQUIRY BY THE PROVINCIAL JUDGES REMUNERATION COMMISSION
(1998) INTO THE COMPENSATION OF PROVINCIAL COURT JUDGES

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO

(the "Government of Ontario")

- and -

THE ONTARIO JUDGES' ASSOCIATION, THE ONTARIO FAMILY LAW
JUDGES' ASSOCIATION AND THE ONTARIO PROVINCIAL COURT
(CIVIL DIVISION) JUDGES' ASSOCIATION

(the "Judges")

BEFORE: Stanley M. Beck, Chair
 Valerie A. Gibbons, Government of Ontario's Nominee
 John C. Murray, Judges' Nominee

APPEARANCES:

On Behalf of the
Government of Ontario: Roy C. Filion, Counsel
Frances R. Gallop

On Behalf of the Judges: C. Michael Mitchell, Counsel
Steven M. Barrett
Michael Code

HEARINGS: November 26, 27, December 16, 17, 18, 1998
January 19, 28, February 4, 15, 1999

Executive Summary

1. This is the Report of the Fourth Triennial Provincial Judges Remuneration Commission. The Commission was constituted pursuant to the Courts of Justice Act, 1994, and the Framework Agreement, contained in Appendix A to the Act. The Framework Agreement governs the jurisdiction and terms of reference of each of the Triennial Commissions. A Commission's recommendations as to salaries, benefits and allowances, but not as to pensions, are binding on the Government.
2. The actual base salaries of the judges of the Provincial Court have not been increased since 1992. The agreed annual cost of living increase ("the AIW") was not paid from 1992 to 1996 due to provincial fiscal restraint.
3. The current base salary of a Provincial Court judge is \$130,810. The base salary of a federally appointed judge of the General Division is \$175,800. Over the past seven years, the salary of the Provincial judges has increased just over \$6,500 (due entirely to the reinstatement of the AIW in 1996), as opposed to \$28,000 for a judge of the General Division.
4. Legislative changes, particularly over the past four years, have seen the General Division's criminal law workload

effectively transferred to the Provincial Court. From 1993 to 1998, there has been a drop of some 78% in the number of criminal cases in the General Division. Those cases are now heard in Provincial Court. The result is, in effect, a single Ontario Court of Justice, with the General Division dealing primarily with matters of property and civil rights, and the Provincial Court dealing with criminal law.

5. The primary criterion which governs the Commission under the Framework is "to provide fair and reasonable compensation ... in light of prevailing economic conditions". The Government's 1998 Budget Statement indicated that in terms of growth, job creation and deficit reduction, the Ontario economy has never been stronger. An expanding economy has allowed for billions of dollars of additional program expenditures, at the same time that the deficit has been reduced.
6. In light of the severe restraint on the judges' salaries since 1991, the de facto transfer of the criminal law jurisdiction to the Provincial Court, and the buoyant state of the economy, it is the appropriate time to correct a significant inequity in the salaries of the Provincial Court.

7. We recommend that "fair and reasonable compensation" would be a salary base of \$150,000 in 1998, \$160,000 in 1999 and \$170,000 in 2000. This recommendation will cost approximately \$10,000,000 over the three year period.
8. The pension plan for the Provincial judges should be brought to the 66-2/3% level of the Federal judges. We set out a number of options as to how this might be accomplished. The mandatory implementation of our salary recommendations without a concomitant revision in the pension plan, would not be sound social policy, and would not accomplish the objective of attracting the ablest men and women to the Provincial bench.



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This is the Fourth Triennial Report of the Provincial Judges Remuneration Commission ("the Commission"). The Commission was constituted pursuant to the Courts of Justice Act, 1994, R.S.O. 1990, c. 43, s. 51.13, and the Framework Agreement ("the Framework") contained in Appendix A to the Act, which governs the terms of reference and jurisdiction of each of the triennial commissions. Prior to dealing with the Framework, it is important to set out the historical context which led to it, as it is not possible to understand the agreement, and what occurred with respect to the remuneration of the Provincial Court judges subsequent to it, without some understanding of the remuneration setting process, the commission reports, and the response of successive provincial Governments.

BACKGROUND

The current structure of the Provincial Court dates from a basic restructuring in 1989. It is important to note, however, that in the 30 years prior to that, there was a steady evolution of the Magistrates', juvenile and family courts into the modern Provincial Court. The result of that evolution has been the creation of a Court that in every sense, in terms of its selection, qualifications, term of office, jurisdiction, responsibilities, and independence, including the process for determining compensation, is an integral part of the judiciary of Ontario. This evolution is best summarized in the statement of

Attorney General Ian Scott, when he announced Ontario's Court Reform initiative in May, 1989:

Judges who conduct trials in Ontario whether criminal, civil or family matters will all be members of the same court...All judges in this Province must meet the same high standard prior to being appointed: ten years' experience at the bar. This is the highest standard in Canada for judicial appointment. Judges of this calibre of legal experience drawn from the same pool of lawyers in the Province should be able to enjoy the full range of judicial work in their area of legal expertise without artificial restrictions based on hierarchy.

Effective September 1, 1990, the Ontario Court of Justice was established. The hierarchy that Attorney General Scott referred to was abolished, at least in form, with the creation of the Ontario Court of Justice. All judges in Ontario, whether appointed by the Federal or Provincial Government, are members of that Court. The new Court was divided into two divisions, the General Division and the Provincial Division. The Trial Division of the Supreme Court and the District Court of Ontario merged to become the General Division. The Provincial Court (Criminal Division) and the Provincial Court (Family Division) merged to become the Provincial Division, and all judges of that Court were expected to hear both criminal and family cases. The final change in nomenclature will take place this year with the Ontario Court (Provincial Division) becoming the Ontario Court of Justice, and

the Ontario Court (General Division) becoming the Superior Court of Justice.

The jurisdiction of the Ontario Court (Provincial Division) ("the Provincial Court") will be dealt with below.

Provincial judges are appointed under Section 41(1) of the Courts of Justice Amendment Act, 1989. The Attorney General may only appoint to the Provincial bench from a list of candidates recommended by the Judicial Appointments Advisory Committee, all of whom must have been a member of a provincial bar for at least 10 years. In short, the members of the Provincial Court are drawn from the same pool of practising lawyers as the members of the Ontario Court (General Division). As with judges of the General Division, judges of the Provincial Court enjoy security of tenure and all the other hallmarks of judicial independence both by statute and under the Constitution; see generally Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island ("the P.E.I. Reference"), [1997] 3 S.C.R. 3.

In the P.E.I. Reference, the Supreme Court of Canada, building on its earlier decisions in The Queen v. Beauregard, [1986] 2 S.C.R. 56, at 74, and Valente v. The Queen, [1985] 2 S.C.R. 673, at 704, firmly established that financial security is one of the necessary essentials for judicial independence, and stressed that the concept includes both the source and level of

compensation. The P.E.I. Reference dealt particularly with the determinative source of judicial compensation and held that:

What judicial independence requires is an independent body, along the lines of bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration....Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, those recommendations are non-binding, and should not be set aside lightly, and if the executive or the legislature chooses to depart from them, it has to justify its decision - if need be, in a court of law (at p. 88).

Ontario presaged the decision in the P.E.I. Reference through the 1992 Framework, which provided for independent triennial commissions whose recommendations as to salaries, benefits and allowances, but not pensions, are binding on the Government.

REMUNERATION HISTORY

Prior to the Framework, there had been a number of reports dealing with the remuneration of the judges. The first Provincial Judges Remuneration Commission was appointed and reported in 1988, pursuant to Section 88 of the Courts of Justice Act, 1984. Prior to the Framework, the commissions made non-binding recommendations with respect to "the remuneration, allowances and

benefits of provincial judges". The first triennial commission was chaired by Gordon Henderson, Q.C. ("Henderson", or "Henderson (1988)"), and its report contains an extensive review of the history and jurisdiction of the Provincial Court, as well as the history of previous recommendations with respect to remuneration and the decision of successive governments with respect thereto. While we do not deem it necessary to review the history and jurisdiction of the Court in as thorough a manner as the first commission, a brief review of the remuneration history is important to give context to our recommendations.

Henderson noted that the touchstone for the judges was what the Federal government paid the County and District Court judges. The gap was briefly eliminated in 1973 and widened thereafter until the County and District Court was merged with the General Division in 1990. The repeated goal of the judges was to eliminate the differential. Indeed, as far back as 1968, the then Attorney General, Arthur Wishart, stated in the Legislature that the salary of the judges "is going to be the same" as that of the County and District Court judges.

The first Provincial Courts Committee was created by Order in Council in 1980, and 1983 amendments to the Provincial Courts Act provided a statutory basis for the Committee and its operations. In December, 1980, the first committee recommended that the judges receive an interim increase of \$5,000 per year,

and the Government responded by increasing salaries \$6,000 per year effective April 1, 1981. In its 1981 report, the Committee considered the recommendations of the Royal Commission Inquiry into Civil Rights (1968) ("the McRuer Report" or "McRuer"), and of the Ontario Law Reform Commission (1973), on an appropriate salary* for the judges. The Committee commented on the "ever-widening gap" that had developed since 1974 between the salaries of the judges and those of the County and District Court despite "an opposite trend to expand the jurisdiction and responsibilities of Provincial Court Judges". The Committee concluded that "there is no justifiable basis for paying Provincial Court Judges less than County Court Judges", and recommended that serious consideration be given to eliminating the disparity. Specifically, it recommended an immediate increase for 1981 and further years "so as to achieve equality of remuneration between the Provincial Court Judges and the County Court Judges by April 1, 1985". No action was taken on the Committee's salary recommendations between its report of January, 1981, and late 1985. In October, 1985, the Committee declined to make any recommendation with respect to salaries until it received a response from the Government to its 1981 recommendations.

As a result, the Chair of Management Board of Cabinet, Elinor Caplan, announced in the Legislature that the Government had "decided not to accept the 1981 recommendation of

the...committee to establish parity" between the salaries of the judges and those of the federally-appointed District Court judges. Between the years 1981 and 1985, the judges received small increments, but "their financial position deteriorated dramatically" (Henderson). Indeed, the gap between the judges and the District Court increased by some 50% between 1981 to 1985. In terms of later increases for both groups that were retroactive to April 1, 1985, the gap increased by 133%. With respect to an actual increase in 1985, the Committee recommended that salaries be increased immediately from \$71,855 to \$80,000. The Government responded by holding the increase to \$75,000, because of the "well-recognized need for restraint in the expenditure of the province's financial resources".

As a result of publicly-expressed concerns in 1987 by the Ontario Courts' Advisory Council, chaired by the Chief Justice, and the judges themselves with respect to the salary impasse, the Government agreed to re-activate the Provincial Courts Committee. It was under that agreement that Henderson was appointed.

HENDERSON (1988)

The judges submitted, and Henderson accepted, as have the Supreme Court of Canada decisions in Valente, Beauregard, and the P.E.I. Reference, supra, that financial security is an essential

component of judicial independence. A proper compensation scheme must recognize the financial position in which a judicial appointment places an individual, and guarantee financial security within that context. Again, the judges argued for a salary that would leave little gap between a Provincial Court judge and a judge of the District Court. Appointment to one should be seen as desirable as appointment to the other. In terms of comparisons, the judges argued for considering those at senior levels of private practice, the District Court judges and Provincial Deputy Ministers. Each of those should be used to provide a comparative framework for an appropriate compensation level.

In its decision, Henderson rejected the notion of parity with the judges of the County and District Courts. It noted the comment of Attorney General Wishart as to the salary level being the same, but also noted that subsequent governments had taken the position that it would be inappropriate to link provincial judicial remuneration with federal judicial remuneration. The Provincial Government has a responsibility to the taxpayers of the Province and it ought not, in effect, transfer decision-making in such an important area to the Federal Government. Henderson, while accepting that, on the whole, the work of the judges was of equivalent responsibility, volume and complexity to that assigned to those who sat on the District Court, declined to take the next step of saying that there should be parity in

remuneration. It essentially agreed with the position taken by the Chair of the Management Board in 1985, that it would be inappropriate to set a provincial salary by direct linkage with a federally-determined salary. Secondly, Henderson noted that it had no way of judging whether the judges of the District Court were being paid appropriately - they could be paid too much or too little. Third, Henderson noted that the Report of the Ontario Courts Inquiry (1987) ("Zuber"), had recommended the abolition of the District Court, and it would be imprudent to recommend salary linkage.

The factor that ranked highest with Henderson, and it is one that will be echoed in the recommendations of this Commission, was the continuing need to attract candidates of the highest quality to the Provincial Court, and to retain them on the bench for the duration of their careers. As Henderson put it, "It is absolutely essential that the salary Provincial Court Judges receive be high enough to signify, both to the sitting Judges and to potential candidates, that the Ontario Government respects and trusts the professionalism and dedication of its judiciary. To be attractive, the salary need not - and ought not to be - excessive. It must, however, be sufficiently generous to offset the financial and social restrictions Provincial Court Judges must endure as a cost of ensuring their independence."

Henderson recommended that the judges receive an annual

salary, effective April 1, 1987, of \$105,000, as against the \$81,510 they were then receiving, a 29% increase. He also recommended that the judges' salaries be adjusted by an inflation factor on an annual basis, and that the national average of the Consumer Price Index be used.

SECOND TRIENNIAL REPORT (1992)

Gordon Henderson also chaired the Second Triennial Commission in 1992 ("Henderson 1992" or "Henderson"). Henderson noted that many of the recommendations made in his first triennial report were not implemented, with resultant "erosion in the salaries and benefits of Provincial Judges". He also noted that, as part of a broad restraint program, the then Government had frozen the salary of the Provincial judges at the 1991 level through to March 31, 1994, which would be the end of the second triennial commission's mandate, all without consulting the Commission. What the Government did accept from Henderson (1988) was the principle of an automatic annual adjustment. The adjustment was to be made on the basis of a wage index published by Statistics Canada (hereinafter referred to as the "AIW", the Annual Industrial Wage). Henderson also noted that the AIW adjustments were also to be frozen to March 31, 1994.

Notwithstanding the freeze in salaries and in annual

increment, Henderson decided to proceed with making recommendations so that they might guide the Government with respect to any future course of action. It should be noted, however, that the Government did increase the judges' salaries to \$105,000 effective April 1, 1989, some two years after Henderson recommended that that salary level come into force. At the time the Henderson (1992) recommendations would take effect, April 1, 1991, the recommended salary rate from Henderson (1988), with adjustments, would have been \$126,655, as against \$116,425, which was the salary paid at that date. Henderson commented that the shortfall for the five-year period from April 1, 1987, to April 1, 1992, over what his Commission considered to be an appropriate salary and what was actually paid, was some \$70,000.

Henderson recommended an annual salary as of April 1, 1991, of \$127,000, with an annual adjustment based on the AIW. He also recommended that the judges receive back pay based on the AIW from April 1, 1987. As noted, Henderson decided to make salary recommendations notwithstanding the Government freeze. The District Court was amalgamated with the Ontario Court, General Division, in 1990, and the submission of the judges therefore became one of parity with the General Division. Once again, Henderson was not prepared to accept the principle of parity. As the Commission put it, "Each level of judicial responsibility and remuneration should be considered on its own merits." If Henderson (1988) had been implemented, including the annual AIW

increase, the April 1, 1991 salary would have been \$126,655, as opposed to the \$116,425 being paid. Henderson (1992) recommended a base salary as of April 1, 1991, of \$127,000, with an annual AIW adjustment to be continued. Henderson was also clear that the judges should receive back pay from April 1, 1987, that is, the \$70,000 that had been foregone.

THE FRAMEWORK AGREEMENT

In the course of the proceedings before Henderson (1992), the judges were advised by the Government that it intended to freeze their salary at the 1991 level from April 1, 1992, through to March 31, 1994, and that the AIW increases would not be provided. It was in that context, which was one of overall Provincial economic constraint, and the judges' continuing concern over their treatment by the Government, that the Framework was negotiated. Apart from the broader agreement, the Framework also set the judges' salary, outside the context of the triennial commissions, at \$124,250 as of April 1, 1991. The judges gave up the AIW for 1992-93, but would receive it thereafter.

The Framework firmly recognized the judges of the Provincial Court as a separate and independent branch of government, and not as employees of the Executive. In this, the Framework provided in

1992 what the Supreme Court of Canada held in 1997 was constitutionally required.

It is the essence of the Framework that it deals with the relationship between the Executive branch of the Government and the judges, "including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining independence of the Provincial Judges." As noted, the triennial commissions make recommendations with respect to salaries, benefits and allowances, and the design and level of pension benefits. A Commission's recommendations with respect to salaries, benefits and allowances, but not pensions, "have the same force and effect as if enacted by the Legislature". The binding process was to take effect as of the 1995 commission. The Framework sets out the criteria which each Commission shall consider. Section 25 of the Framework is as follows:

The parties agree that the Commission in making its recommendations on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2.

- (a) the laws of Ontario,
- (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial

economy,

- (c) the growth or decline in real per capita income,
- (d) the perimeters set by any joint working committees established by the parties,
- (e) that the Governments may not reduce the salaries, pensions or benefits of Judges, individually or collectively without infringing the principle of judicial independence,
- (f) any other factor which it considers relevant to the matters in issue.

These criteria will be considered in more detail later in these reasons.

THE SOCIAL CONTRACT ACT AND THE FREEZE

The Framework was finalized in November, 1992. It was followed almost immediately in 1993 with the Government's proposals for a "social contract" to cover wages across the public sector in a time of economic difficulty. A Social Contract Act was passed, but the judges took the position that it did not apply to them. The result of negotiation was a Letter Agreement between the Attorney General, Marion Boyd, and the judges, whereby the judges, in addition to the freeze on their salaries for 1992-93, agreed to forego their AIW increase for the years 1993, 1994 and 1995. They also agreed to collectively make

available up to 3,000 extra sitting days per year. As part of the deal, it was agreed that the Framework would be included in a Bill containing amendments to the Courts of Justice Act, and that the Third Triennial Commission would be postponed from 1995 to 1996. Following the deal, the Government agreed that the Social Contract Act would not apply to the judges. The result of the above was that the judges received a salary increase on April 1, 1991, and no increase thereafter, and no annual increment from then until April 1, 1996.

THE THIRD TRIENNIAL COMMISSION (1996)

The Third Triennial Commission ("Brown" or the "Third Commission") reported in May, 1997, but its recommendations were retroactive to April 1, 1996. When Brown began its deliberations, the Framework had established the annual salary of a judge at \$124,250. In addition, as noted, the judges subsequently agreed to waive the AIW to which they would have been entitled for the years 1993, 1994 and 1995. The effect of this was to freeze the judges' salary from 1992 until April, 1996. Apart from other submissions for a salary increase, the judges asked for a restoration of the annual AIW from either 1991 or 1992, which would have resulted in a salary of either \$139,300 or \$133,550. The Government argued that the Province was still faced with high levels of debt and a continuing deficit of some \$8.2 billion in

the current year (1997) and, accordingly, it would be inappropriate to award a salary increase. The AIW adjustment for 1996 (the freeze now being off) would move the salaries from \$124,250 to \$125,120, and that was fair and reasonable in terms of the Framework.

Brown concluded, notwithstanding the evidence of increased levels of responsibility and increased caseload, that it would be inappropriate, in light of the financial condition of the Province, to award any increase beyond the automatic AIW. In taking this position, Brown commented as follows:

...This Commission shares the views expressed by the Scott Commission [the Federal Judges Remuneration Commission] to the effect that if the present quality of justice in Ontario and the independence of the judiciary are to be maintained, the apparent erosion in the overall financial position of the Judges must be reviewed again. We are all of the view, however, that this review should be carried out by the Fourth Triennial Commission to be struck in 1998. Moreover, given the pace of improvement in the provincial economy and, in particular, the improvement in the Government's financial condition, it would seem appropriate that the Fourth Triennial Commission inquires as to why a Judge's remuneration ought not to be restored to the level that would have been achieved had the AIW increases not been voluntarily waived for the years following the Framework Agreement to 1996.

Brown went on to state that the rationale for the AIW increases was to maintain the judges' remuneration at a constant

level, and that had not happened as a result of the 1992 Agreement. Accordingly, when financial circumstances permitted, Brown was of the opinion "that the foregone AIW increases ought to be implemented to maintain the integrity of the 1992 Framework Agreement". With respect to pensions, Brown made the following statement:

Finally, this Commission is of the view that the present pension arrangements need to be studied again. It may be that a pension that more closely approximates the pension benefits of federally-appointed Judges would be appropriate. Again, in the present circumstances, and without the benefit of a thorough analysis, a change at this time is not appropriate.

THE CURRENT CASE

The essential position of the judges was that the nature of the Provincial Court has been completely transformed over the past ten years in terms of jurisdiction and workload, as well as in quality and selection of candidates for the Court. In the criminal law area particularly, the Provincial Court has become the primary court for criminal cases, whether minor or serious. It also has an enhanced place in family law, its jurisdiction over Charter cases has been affirmed by the Supreme Court, and it is often where ever-expanding regulatory actions are argued. In that context, it was argued, the judges should receive the same

salary and benefits as the judges in the General Division. In short, the argument was, once again, for parity.

The judges also asserted that the Government could no longer raise the spectre of adverse economic conditions to argue against appropriate remuneration for essential actors in the administration of justice. All the indicators point to a thriving provincial economy, and Government's expenditure decisions clearly indicate that money is available for those matters that are deemed to be important, and worthy of financial support. In that context, it was argued, it was no longer appropriate to short change those who preside over the Provincial Court and who are the primary face of justice to those who appear in the courts in Ontario. Each of the primary jurisdictional/workload arguments will be dealt with separately.

CRIMINAL LAW

The argument for the judges was that the steady reclassification of criminal law offences over the past 30 years, and particularly over the last four years, has been to dramatically increase the criminal jurisdiction of the Provincial Court. Statistics were cited to show that there has been a dramatic fall in the hitherto large percentage of indictable offences dealt with by the General Division. The accepted

generalization with respect to the classification of offences under the Criminal Code is that the more serious crimes are indictable offences, and the less serious crimes are summary conviction offences. And, traditionally, the General Division dealt with indictable offences, usually after a preliminary hearing in Provincial Court, and the Provincial Court dealt with summary offences. In the case of what has become known as "hybrid offences", the Crown can choose to proceed by either procedure, although previously the election resided primarily with the accused.

The position now is, through the legislative changes that will be referred to below, that there are only a very small group of indictable offences that fall exclusively within the jurisdiction of the General Division. Realistically, it is only murder and conspiracy to commit murder that fall into that category. A second sub-class of indictable offences is where the accused can elect the mode of trial, that is, summarily before a Provincial Court judge, or through indictment in the General Division with a preliminary hearing in the Provincial Court. A third sub-class are those indictable offences reserved exclusively for the Provincial Court. All summary offences, and all hybrid offences where the Crown elects to proceed summarily, are heard in the Provincial Court.

The constant legislative trend over the past 30 years has

been to move offences from the General Division to the Provincial Division, either by an outright classification of offences, an increase in the accused's election or, most importantly, the creation of hybrid offences. Hybrid offences are those where the election is up to the Crown (rather than the accused) as to whether to proceed by indictment or summarily. It was the submission of counsel for the judges that it was the significant move to hybrid offences in the 1990's that has had the most dramatic impact on the criminal law workload of the judges.

The last five years has seen four major reclassifications: Bill C-42 was passed in 1994; Bill C-17 and Bill C-8, the Controlled Drugs and Substances Act, were both passed in 1996; and further Criminal Code amendments have been tabled currently in the House of Commons. The overall effect of this legislation is to create, in effect, a single Criminal Court for Ontario in the Provincial Court (or its equivalent in the other provinces).

The increase in penalty available to the Provincial judges under the new legislation was, it was argued, as important as the creation of hybrid offences. Some of the serious crimes of violence, including those involving sexual assault, had previously been hybrid offences but carried the maximum summary conviction penalty of six months imprisonment. Accordingly, Crown prosecutors were reluctant to proceed by summary conviction. Bill C-42 tripled the summary conviction penalty to 18 months

imprisonment and this, along with making the most serious crimes of violence, apart from murder, hybrid offences, has had the effect of causing the Crown to proceed by summary conviction in a broad range of crimes. At the same time, Bill C-17 allowed the Crown and defence counsel to agree on a summary election in cases that were over six months old, something that was previously prohibited. This has allowed the increase in what might be termed historical offences, such as sexual assaults and child abuse, to be heard in the Provincial Court.

Bill C-8 accomplishes the same purpose for a wide range of drug offences, either placing them in the absolute jurisdiction of the Provincial Court or making them hybrid offences, with the sentence for possession and trafficking increased to five years less a day. The amendments that are currently before the House of Commons will further increase the number of serious offences that previously were exclusively indictable into hybrid offences, with appropriate sentencing powers in the Provincial Court. The net effect of all of the above, is that for practical purposes only the offences of murder and conspiracy to commit murder remain outside the jurisdiction of the Provincial Court. And in those cases that do proceed by indictment, a preliminary hearing is still conducted in Provincial Court.

Related to criminal jurisdiction is the Provincial Court's jurisdiction under the Young Offenders Act (YOA). This is in

effect a criminal code for offenders under the age of 18. In summary, all crimes committed by those under 18 years come within the exclusive jurisdiction of the Provincial Court. In the recent past, this has become an increasingly significant, and clearly important, part of its work.

THE TRANSFERRED WORKLOAD

The position of the Government was that there "has been very little change, at least since 1988, of the percentage of the criminal case load in Ontario that is disposed of in the Provincial Division". Indeed, counsel for the Government referred to the submission of Paul French, counsel to the judges in 1988, who stated to Henderson that:

For all practical purposes, the Criminal Division of the Provincial Court has jurisdiction over everything, except murder committed by an adult.

The conclusion to be drawn from the evidence that you have heard and from the statistics that have been made available to you are that anywhere between 95 to 97% of all the criminal matters in the Province are disposed of in the Criminal Division.

In short, counsel argued that the arguments made before this Fourth Triennial Commission were almost exactly the same arguments made to the First Triennial Commission, using the same

transfer of jurisdiction, and virtually the same criminal statistics. Looking at the percentage of criminal matters that the Provincial Court now disposes of, as against the numbers in 1988, it was submitted that the increase could hardly be characterized as a "dramatic increase" in jurisdiction and workload.

Apart from the statistical evidence, counsel for the Government also made the point that the Provincial Court has always had jurisdiction to deal with the types of offences that over the past number of years have been transferred exclusively to the Provincial Court, or made hybrid offences. In short, the jurisdiction has not been expanded; what has been expanded are the areas of either exclusive jurisdiction, or where the election as to how to proceed has been placed in the hands of the Crown rather than the accused.

The Judges' brief also referred to the Charter of Rights and Freedoms as expanding the jurisdiction of the Provincial Division. Once again, the Government argued that although that might be so, it was hardly a new matter. Again, the same submission was made in 1988 to Henderson. The judges' 1988 brief stated that:

The impact of the Charter of Rights has been greatly felt in the Provincial Court (Criminal Division). It is now the rare case

where a Charter argument is not made at trial....its judges have the task of defining the Charter of Rights, and making it relevant to the citizens of Ontario.

In summary, the Government submitted that on comparing the situation in 1988 as against the situation in 1998, it is difficult "to conclude that there has been a dramatic increase" in the Court's jurisdiction and workload.

Apart altogether from the argument over increased criminal jurisdiction and workload, the Government made the point that the judges did not address the significant increase in their numbers to deal with criminal law matters. On May 31, 1988, there were 159 judges in the Provincial Court (Criminal Division). By contrast, in 1998 there were 198 judges who were assigned exclusively or predominantly to criminal law matters. Indeed, some 27 of the new judges were appointed specifically to deal with the criminal caseload as a result of the decision of the Supreme Court in R. v. Askov (1990) 59 C.C.C. (3d) 449, where the case was dismissed because of undue delay and the Court was critical of the time it took to bring criminal cases to trial. The result, with an attendant public outcry, was a stay of proceedings in some 50,000 cases. It was this that led to the appointment of the 27 new judges in Ontario. In short, the Government submitted that it was "meaningless" to consider any increase in workload or jurisdiction without also examining the

increase in the number of judges available to handle the workload.

THE WORKLOAD

It is always difficult to deal with statistical arguments, particularly when it was submitted by the judges in 1988 that between 95% to 97% of all criminal matters in Ontario were handled in the Provincial Court (after analysis of Ministry of the Solicitor General "disposition" statistics, Henderson stated that the figure was 93%). What does it mean to say that there has been a 2% to 3% increase in the number of criminal offences disposed of in the Provincial Division? When the comparative statistics of the indictable offences heard in the General Division and the increase in the caseload of the Provincial Division are examined, it is clear that there has been a significant increase in the number of serious matters now heard almost exclusively in the Provincial Division. This is clearly a result of the jurisdictional and sentencing changes outlined above.

The judges submitted that the Ministry's 1997 data showed that the General Division received approximately 2% of the criminal case load, with the approximately 98% remainder being disposed of in the Provincial Court. Indeed, the Ministry's

figures for 1992 as against 1997 for the Provincial Court show 92% disposition in 1992 as against 97% disposition by 1998. Most importantly, the figures show that the greatest decline in General Division dispositions occurred over the last three years, that is between 1995 and 1998. The "Indictments Disposed" chart indicates a 50% drop, from 10,823 to 5,500 indictments, over the last three years. How significant, if at all, is that change? Is it insignificant, as the Government would have it, or does it indicate a change of important magnitude as the judges submit? There is no question that a 50-60% reduction in General Division indictments between 1993 and 1997 is large. Does it, however, indicate a significant increase in the Provincial Court's workload when approximately 500,000 charges are laid each year?

On a consideration of the statistics, and considering counsel's arguments as to what they actually indicate, we are of the opinion that fully three-quarters of what was previously a "significant and difficult caseload" in the General Division has been transferred to the Provincial Court. This, by itself, must have a significant impact on its workload. It is not just a matter of the number of cases, but also of the type of case, as one is talking about the most serious criminal offences that were traditionally within the exclusive preserve of the General Division, or were chosen to be proceeded with in the General Division by Crown counsel. In short, there has been a qualitative change in the kind of case and proceeding that is now conducted

in the Provincial Court rather than the General Division, "that results in lengthy or more complex proceedings that involve greater responsibility for the Provincial Division than in an earlier era".

Counsel for the Government argued that the admittedly large reduction in the General Division's criminal caseload of some 60% between 1993 and 1997 represents only a small - 5% - increase in the Provincial Division's total caseload. Counsel for the judges argued strongly that this was an inherently implausible argument. The figures for 1998 now show a 78% decline in the General Division's caseload and, it was argued, on the Government's theory, if the General Division's entire criminal workload were moved to the Provincial Court, it would still be insignificant. It was argued that given the type of case concerned, that is, the most serious indictable offences, such a large shift was bound to have a significant impact on the Provincial Court.

Moreover, once it was appreciated that of the some 500,000 charges laid each year, only 8-9% actually proceed to trial or a preliminary hearing, the impact of shifting an additional 5% of serious indictable matters from the General Division to the Provincial Division, can be appreciated. That 5% represents, according to the judges' argument, 25,000 charges that were not resolved earlier and required at least a preliminary hearing. And it is reasonable to assume that some "significant proportion" of

them would be included in the 8% of cases that actually proceed to trial. This, it was stressed, constitutes an enormous quantitative, as well as qualitative, increase in the workload of the Provincial Court.

INCREASE IN NUMBER OF JUDGES

As indicated above, counsel for the Government submitted that the increased workload for the Provincial Court must be seen in the context of the increased number of judges appointed to handle that workload. In 1988, there were some 159 judges sitting in the Provincial Court (Criminal Division). In 1998, there were 198 judges assigned exclusively or predominantly to criminal matters, and another 26 that are available for criminal law work. If there are 198 judges whose work is predominantly criminal, that is an increase of 39 judges, or 25% more than were available to hear criminal matters in 1988. In submission of the Government, it would be "meaningless" to examine the increase in workload or jurisdiction without also considering the significant increase in the number of judges available to handle that workload. The Government also submitted that a relevant statistic would be the number of days that the judges spent in Court from fiscal year 1994/95 (the first year relevant statistics were kept) to fiscal year 1997/98. The Government's figures indicate that the average annual days in Court have remained almost

constant at 177 days for the four-year period.

The judges' reply to the increase in their number, stressed again not simply the quantity of the workload, but the "increased responsibility, difficulty, complexity and importance" of the workload. The argument was that the Provincial Court's criminal work was now so similar to the previous workload of the General Division that, for that reason alone, parity in remuneration was justified. The judges also argued that the increase in judicial complement must also be measured against the growth of the caseload, and that when those figures were considered, the increase in complement was slightly less than the maximum increase in charges received. In addition, counsel made the point that during the period 1990 to 1998, the number of Crown Attorneys in Ontario has increased from 387 to 548, a 41.6% increase in complement. This gives some idea of the increased workload in the Provincial Court (Criminal Division), and is to be compared with the increase in judicial complement. Finally, when one compares the judges in the Provincial Court with those in the General Division, one sees significantly increased salaries and dramatically-reduced criminal caseloads for the General Division, as opposed to the opposite scenario for the Provincial Court (Criminal Division).

FAMILY LAW

As with criminal law, the judges submitted that the Provincial Court deals with a broad range of family law matters in Ontario. These include matters arising under the Children's Law Reform Act (Custody and Access), the Family Law Act, the Child and Family Services Act and other related statutes. Indeed, the only matters that fall exclusively to the General Division are divorce (which was agreed has today become a relatively minor matter), and custody, access and support ancillary to divorce. The support ancillary to divorce is only exclusive to the General Division if it concerns a matrimonial property issue. A further significant consideration with respect to family law is the creation of the Unified Family Court in 1977 under the Unified Family Court Act. Originally, it consisted of provincially appointed judges of the Family Court who, through agreement with the Federal Government, were also given jurisdiction over those matters reserved to federally appointed judges. In 1990, the Provincial Family Court became a branch of the General Division and was renamed the Family Court.

The Family Court currently operates as a branch of the General Division in the Counties of Hamilton-Wentworth, Frontenac, Leonard and Addington, Middlesex and Simcoe. This expansion was partially accomplished through the re-appointment or appointment of some judges of the Provincial Division to the

General Division. It is the expressed intention that when agreement is reached with the Federal government, the Family Court will be expanded to cover all of Ontario. It is also understood when the next expansion takes place in 1999, at least three-quarters of the appointees to the Family Court will come from the Provincial Division. In short, a significant percentage of judges in the Provincial Division with expertise in Family Law will become federally appointed judges with remuneration on the Federal judicial scale "while performing work which is not significantly different than the work they now perform in the Provincial Division" (Judges' Brief, p. 36).

The Government submitted, once again, that the Provincial Division's jurisdiction with respect to family law was basically the same in 1988 as it is today and, accordingly, was taken into account by the first three triennial commissions. Essentially, the only matters reserved exclusively to the General Division are divorce (and custody, access and support ancillary to divorce) and the distribution of matrimonial property. Indeed, with the creation of the Family Court, the workload of the Provincial Division in the family law area is actually decreasing. In 1995, the Family Court branch of the General Division was expanded to four new locations: London, Barrie, Kingston and Napanee. Five of the eight federal appointments came from the Provincial Division. The Family Court will be expanding to 12 new locations this year: Ottawa, Brockville, Perth, L'Original, Cornwall, Oshawa,

Peterborough, Lindsay, Cobourg, Newmarket, Bracebridge and St. Catharines. While there is no firm commitment that three-quarters of the new appointments will come from the Provincial Court, it is expected that a substantial number will come from the Provincial bench based on their experience in family law.

Those who are appointed to the Family Court will have the opportunity to be rotated out to do other General Division work. Similarly, other General Division judges will be able to be rotated into the Family Court. The importance of that, in the Government's submission, was that the jurisdiction in family law is still somewhat different in the General Division than in the Provincial Division, and those who are appointed to the Family Court are appointed as judges of the General Division and as such may be called upon to hear any matters within the General Division's jurisdiction. Moreover, in terms of workload, the creation and ongoing expansion of the Family Court will see the percentage of family law matters handled in the Provincial Court fall from 75% in 1988, to approximately 39% once the 1999 expansion of the Family Court is completed. A further recommended change that is likely to be enacted is that Young Offender matters which have been dealt with in some of the Family Courts on a trial basis, will be dealt with exclusively in the Provincial Court.

THE FRAMEWORK CRITERIA

It remains to consider the criteria which must govern this Commission in its decision-making. The criteria have been set out above. The two overriding and relevant criteria are those contained in Section 25(b) and (f). Section 25(b) reads as follows:

(b) The need to provide fair and reasonable compensation for Judges in light of prevailing economic conditions in the province and the overall state of the provincial economy.

Before considering the fundamental issue of "fair and reasonable compensation", it is necessary to assess economic conditions and the state of the provincial economy.

THE PROVINCIAL ECONOMY

It is perhaps not too strong a statement to say that the Ontario economy, in terms of growth, job creation and deficit reduction, has never been stronger. To quote the Minister of Finance, The Honourable Ernie Eves, Q.C.:

In the first quarter of 1998, Ontario experienced a rate of job growth unprecedented in the past 15 years....Between February, 1997, and February, 1998, more jobs

were created in Ontario than have ever been created in a one-year period in the entire history of our Province.

The Province's economy expanded by 4.8% in 1997. The average private-sector forecast for growth in 1998 is 4.0%.

The private-sector forecasters expect Ontario's economy to grow faster than that of any of the G-7 over the next three years.

As would be expected in a robust economy, the deficit has been steadily reduced. The Minister announced that the 1997-1998 provincial deficit would be 5.2 billion dollars, a reduction of almost 1.4 billion dollars from the 6.6 billion dollar target set out in the 1997 budget. Moreover, the Minister was confident that the deficit would be eliminated by the year 2000-01. The 1998-99 forecast deficit of 4.2 billion dollars is to be contrasted with the actual deficit of 11.3 billion dollars in 1995-96. In short, over a four-year period, there has been a deficit reduction of some seven billion dollars.

The expanding economy has translated into rapid job creation, with some 265,000 net new private sector jobs being created in the 1997-98 period, the largest number of jobs created in a 12-month period in the Province's history. Strong economic growth has, of course, meant greatly increased provincial revenues which has allowed for a 30% reduction in the provincial personal income tax since 1995 (and this at the same time that the deficit has been reduced some 11 billion dollars). Indeed,

the economic performance has allowed the Government, as indicated by the Minister, to complete a 30% provincial income tax cut by July 1, 1998 - half-a-year ahead of schedule.

The Minister's 1998 Budget Statement also outlined the program initiatives that an expanding economy allowed. It is not necessary to detail here these initiatives. Suffice it to say that they run the gamut from education, health care, including salary increases for health care professionals, research and development funds, cultural initiatives, transportation upgrades, jobs in tourism and the arts, a youth training program, a major new student assistance program (jointly with the Federal Government), an opportunities program for those with learning disabilities, and an access to opportunities program focused on computer scientists and engineers. These are only a partial list of the programs, that over a number of years run into billions of dollars of expenditures. They are all reflective of a strong North American economy of which Ontario is Canada's major beneficiary. This has allowed strong program expansion and for individual sector needs to be addressed, at the same time that the provincial deficit and personal income taxes have been sharply reduced.

The Government, in its argument, recognized that the provincial economy has been strong and is continuing to improve. It chose to emphasize, however, the "astronomical debt load" of

approximately 110 billion dollars. It argued that the Province's fiscal condition ought to be seen in light of that debt and its nine billion dollar annual interest cost. Although a snapshot of the particular year indicates a strong economy, the overall fiscal condition is not one that dictates large wage increases, and the arguments of the judges ought to be seen in that context. The Government's brief also noted that the unemployment rate is currently at 7%, which is high compared to the 5% annual average rate in 1988. While the Ontario economy is strong and continuing to recover, it "still has some way to go to reach full health".

With respect to the debt, the judges responded that that is a matter of Government choice in times of an expanding economy. That is, the Government has chosen tax reductions and increased expenditures to utilize its greatly increased revenues. A different choice might have seen a greater emphasis on debt reduction. Every Government makes those sorts of economic tradeoffs given the interest cost of carrying the debt, as against the expansionary nature of tax reductions. Expansion will see the debt fall as a percentage of the provincial domestic product, which many economists see as the more relevant measure in terms of coping with Government debt. Indeed, many governments choose not to devote actual dollars to debt reduction at all, but rather rely on expansionary fiscal and monetary policies to lower debt as a percentage of an expanding GDP. It is that figure that is the most relevant in terms of an economy's capacity to carry

the interest charges.

Counsel for the Government also argued that there was no guarantee that strong economic conditions would continue indefinitely and, accordingly, the Government must be prudent in managing its finances. While it is certainly true that there is no guarantee of economic strength for the indefinite future, it is also true that the Government itself, in the Minister's 1998 Ontario Economic Outlook and Fiscal Review, forecast continued economic growth and low inflation. Indeed, the Minister quoted from the economic forecasting firm DRI/McGraw-Hill, in October, 1998, to the effect that "Ontario is expanding quickly...Lower tax rates and a large share of high technology industry will help to keep Ontario at the top of the provincial growth rankings over the next decade."

The Minister emphasized that Ontario is particularly well positioned globally. In terms of the economic downturn in Asia, he noted that Ontario's exports are oriented primarily to the U.S. market and consist mainly of finished consumer goods and capital goods. As a result, Ontario is less exposed to instability in Asia and the difficulties in the world's commodity markets. Indeed, with primary industries accounting for under 2% of the Province's GDP, Ontario has the least resource-based economy of all the provinces. In short, in terms of the near future, the economic outlook for Ontario remains very strong.

CONCLUSION ON ECONOMIC CRITERION

On all of the evidence, it is unquestionably clear that the Ontario economy is in excellent shape and is continuing to grow and create jobs at record rates. As noted, the Government has been able to reduce personal income taxes while at the same time funding a variety of programs deemed important to Ontario's economic, social and cultural well-being. And all of this at the same time that the provincial deficit has been greatly reduced. Whatever the merits of an increase in remuneration for the judges may be, we are of the opinion that there is no case for restraint based on the condition of the provincial economy, or expenditure restraint by the Government itself.

The conclusion with respect to the criterion set out in Section 25(b) of the Framework, insofar as it refers to "...prevailing economic conditions in the Province and the overall state of the provincial economy", is that economic conditions in Ontario are very strong, as is the overall state of the provincial economy. The Government's economic figures, quoted above, clearly indicate that, as do the Government's expenditure decisions, both of a major and minor nature, and of a one-time and multi-year commitment. The decision as to what would be "fair and reasonable compensation for the judges" in light of these economic conditions, will be dealt with below.

The criterion in Section 25(f) refers to "any other factor which it [the Commission] considers relevant to the matters in issue." We do not regard that criterion as in any way being limited by the criterion in Section 25(b). That is, it is an independent criterion which allows the Commission to take into consideration factors which it deems to be relevant. Again, this will be dealt with in our decision as to "fair and reasonable compensation".

FAIR AND REASONABLE COMPENSATION

The argument for the judges was, once again, parity with judges in the General Division. That would mean a salary of \$175,800 as against the current \$130,810. The argument was that the Provincial Court, as a result of the changes outlined above, has become the Criminal Court for Ontario. The General Division is the court for civil matters and family law. In reality, that is the only distinction between the Courts, apart from the inherent jurisdiction that lies with a superior court of record such as the General Division. That difference, however, was not enough, it was argued, to justify a large discrepancy in remuneration paid. There is now, in effect, one Ontario Court divided into the General Division for civil and family matters, and the Provincial Division for criminal law matters. To consign the Provincial Court to a second-class status in terms of salary

and pensions is, it was argued, to downgrade the importance of the Criminal Court. It is to send a message both to the profession and to the citizens of the Province that the criminal jurisdiction is of lesser importance than the jurisdiction that deals with property and contractual rights.

Counsel for the judges went through the history of their remuneration, and noted the continuing failure of governments to implement the recommendations of successive Committees and Commissions, usually on the basis of fiscal restraint. He argued that in light of current economic conditions, the time had now come to recognize the reality of the court system in Ontario, and to put all judges on the same economic basis. The issue was not one of "automatic linkage" which had been rejected by Henderson in 1988 and 1992, but of simple equity between those who perform the judicial function in Ontario. We ought not to perpetuate the perception of a second-class court, especially when it is that court that administers the criminal law and is the face of justice to the overwhelming majority of citizens who come into contact with the courts.

The position of the Government was that the case for parity with the General Division (and previously the District Court) has been a constant theme of the judges before each of the successive Committees and Commissions. Each one, it was argued, has rejected the concept of automatic linkage, notwithstanding some

expressions by various Attorneys-General that there should be no disparity. It was particularly emphasized that the argument for parity was strongly urged on Henderson (1988) and Henderson (1992), and was rejected both times. Henderson was firmly of the view that the matter of the appropriate salary for the Provincial Court is one for Ontario to determine in light of economic and social factors pertaining in the Province. Insofar as support for parity was expressed, it was with reference to the District and County Court, and not with respect to the General Division.

The Government also argued, as noted above, that most of the changes that have taken place in the Provincial Court's jurisdiction had already occurred by 1998 and were, accordingly, taken into account by the first three triennial commissions, as well as by the judges and the Government in the Framework. Insofar as there has been an increase in workload, it has been offset by the appointment of more judges, and the on-going transfer of family law jurisdiction to the Family Court. In summary, the Government submitted that the judges' salaries, pensions and benefits were "at a fair and appropriate level, and their salaries ought not to be increased beyond the automatic adjustment each year based on the AIW". Moreover, it was argued that the criteria outlined in the Framework do not justify any increase in compensation beyond the automatic AIW increase.

DECISION

While we do not consider that there ought to be automatic linkage with the federally-determined salary for judges of the General Division, we do think that the time has come for a substantial increase in the salary of the judges of the Provincial Court, such that the disparity with the General Division is considerably narrowed. As outlined above, successive governments have turned a deaf ear to the recommendations of the Committees and Commissions over the years with respect to appropriate remuneration. Moreover, as a result of general economic restraint and the salary freeze, including the give-up of the automatic AIW increases from 1992 through 1995, the judges have seen their salaries severely restrained in this decade and have fallen further behind their federal counterparts.

There are a number of factors that we consider relevant in setting an appropriate remuneration base. One very clearly is the salary paid to the judges of the General Division. The General Division is the Civil Court of Justice for Ontario; the Provincial Court is the Criminal Court of Justice for Ontario, and we can see no reason that justifies a significant disparity in the remuneration paid to the Provincial judges. While we reject the concept of automatic linkage, the salary of \$175,800 currently paid to judges of the General Division is one very important factor which we would take into account.

In considering the salaries of the federal judges as extremely relevant, we are mindful of the writings of Professor Peter Russell, the leading scholar of the Canadian courts. Russell has noted that the differential treatment of federal and provincial judges promotes the perception of a two-level system of justice. To paraphrase Russell, this may have been tolerable when the provincial courts dealt with minor matters. It is not tolerable, however, when those courts are vested with jurisdiction over the most vital matters between the citizen and the state - the criminal law.

Russell has been particularly acute in stressing what is essentially a class-based distinction in treating the courts as a hierarchy, with the provincial courts at the lower end:

The traditional practice of paying judges of the so-called lower courts much less than the judges of the intermediate and superior courts of the provinces may appear logical when the judicial system is viewed as a hierarchy. But the problem with translating this hierarchy of courts into a hierarchy of salaries is that we do not want the quality of justice to be hierarchically arranged. The quality of adjudication is likely to bear some relationship to the remuneration of the adjudicator. Commentators on our judicial system never tire of observing that most Canadians who experience the quality of justice at first hand do so in the lower courts. Accepting lower standards here in the courts used most often by Canadians from lower-income brackets, is a significant source of social injustice in Canada.

While we do not recommend parity, we think the time is long past-

due to end out-dated notions of hierarchy and second class status.

Another relevant factor is the salary paid to the most senior level of the civil service in Ontario. It is the salary determined in Ontario for the leaders and managers of the civil service. The judges of the Provincial Court are the senior provincial judicial officials, and while the two functions are vastly different, the salaries paid to senior civil servants are clearly a relevant factor to be taken into account.

The Crawford Commission (Federal, 1992) made the point as follows:

We believe that an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of federal public servant, the Deputy Minister 3, commonly referred to as DM-3. As the two immediately previous Triennial Commissions have also indicated, the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.

In 1998, the average salary for a DM-3 in Ontario was in the \$170,000 plus range and topped at \$195,000. We would particularly note the increases that were given in 1997. They were clearly to address what was seen as the deteriorating position of the most senior officials, coming through the years of financial

stringency - a position not unlike that of the judges. The increases averaged \$41,600, which was an average salary increment of fully one-third. The increases continued in 1998, averaging 6.6%. While we do not recommend similar increases for the judges, we do consider how the government treated its most senior officials when the economy improved in 1997, to be particularly relevant.

A third relevant factor is the remuneration of practising members of the Ontario Bar. And here there was a good deal of controversy as to what the figures show and what is the relevant section of the Bar. Is it the average practitioner in the criminal courts? Should it be the most senior and highly-paid criminal lawyers in the hopes that they might be attracted to an appointment in the Provincial Court? Or should it be senior Crown counsel who appear daily in the Provincial Court? Depending how one answers those questions, the relevant figures would vary widely. On the whole, we are of the opinion that a figure in the area of what is paid to judges in the General Division, that is, \$175,000, is a reasonable level of remuneration for those who we hope would seek appointment to the Provincial bench. That figure is higher than what is currently being paid to senior Crown counsel, and is more than is earned by some criminal lawyers. At the same time, however, it is far less than is earned by more senior criminal lawyers, and those who do a combination of civil and criminal litigation. The salary surveys were not at all

helpful in determining this question, and the best we, or any Commission, can do is to look at a cross-section of actors in the criminal law arena and ask what is a reasonable level of salary to consider.

Another factor that we think is important is the attraction of the Provincial bench to a cross section of the best of the men and women practising at the criminal bar, or with some experience at the criminal bar. For many, appointment to the Provincial Division would see little, if any, increase in salary. For others, such an appointment would constitute a fall, in some cases a very sharp fall, in remuneration. What is absolutely essential is that the level of remuneration (including pension, which will be dealt with below), be set at such a level that it will be attractive, or at least not a disincentive, to the ablest men and women at the bar. We are of the opinion that the current level of \$130,810 is a disincentive, and a substantial increase is justified.

The inequity in a significant discrepancy between the salaries of federal and provincial judges, is brought into sharp relief by the creation of the Family Court. As noted, approximately three-quarters of the appointments to that Court have and will come from the Provincial Division. And when appointed, the salary becomes that of a judge of the General Division - for doing essentially the same work that was being

done while in the Provincial Division. While it is true that a judge of the Family Court can be rotated into General Division work, it does not change the fact of sharply increased pay for basically exercising the same jurisdiction. The matter is one of pure happenstance - the creation of the Family Court and the appointment of a significant number of Provincial Court judges to it. The question then becomes: should those who exercise the criminal law jurisdiction be paid significantly less than those who exercise the family law jurisdiction? We think not.

Support for a decision to award a substantial increase in remuneration "in light of prevailing economic conditions in the province" is outlined above. There is no need to repeat what we have said. The current levels of Government expenditure in the context of greater than budgeted for revenues, clearly indicate that money is available for a wide range of social, economic and cultural matters that are deemed worthy of support. Beyond all question, a substantial increase in the remuneration of the judges of the Provincial Court is one such matter. Our decision is as follows:

1. Commencing April 1, 1998, the base salary shall be \$150,000;
2. Commencing April 1, 1999, the base salary shall be \$160,000;
3. Commencing April 1, 2000, the base salary shall be \$170,000.

The total base salary cost for the Ontario Court (Provincial Division) is \$33,104.323. The increase in salary to \$150,000 in 1998 will cost approximately \$4,788,000, based on 250 puisne judges. The increase to \$160,000 in 1999 and \$170,000 in 2000, will cost an additional \$2,500,000 in each of those years. The total cost of the increases over three years will be somewhat over \$10,000,000, including those judges who hold senior administrative positions. Whether looked at in individual years, or in the aggregate, the cost is small both in absolute terms, and relative to the social benefit gained.

We are of the opinion that the recommended staged salary increase, with a final base of \$170,000, provides a "fair and reasonable compensation for Judges in light of prevailing economic conditions in the Province...". While each successive Commission will, of course, make its own determination, we are of the opinion that the ratio of \$170,000 to \$175,800 is an appropriate range for the judges in the Provincial Court as against the judges in the General Division. In so stating, we have in mind the stated purpose of Attorney-General Ian Scott when he announced the creation of the Ontario Court of Justice:

"[There] would be a single high standard of appointment to the bar, and essentially a single court, where judges drawn from the same pool of lawyers in the Province would be able to enjoy the full range of judicial work in their area of legal expertise without artificial restrictions based on hierarchy."

If the increases are thought to be generous, they are only so in light of the extremely restrictive salary position since 1991, which has seen an increase of just over \$6,500 in the past seven years, as against \$28,000 for the General Division in the same period. We would put particular stress on this point. For five of the seven years since 1991, the judges' salaries were frozen. In those years they did not receive the annual AIW increase (albeit through agreement), which was put in place to keep their salaries constant. Had the AIW increases been applied to the 1991 base, the 1998 salary would be \$145,706. And we were mindful of the Third Triennial Commission's admonition, that when financial circumstances permitted, "the foregone AIW increases ought to be implemented to maintain the integrity of the 1992 Framework Agreement" (emphasis added). To bring the 1998 rate to \$150,000, is a very modest increase to the salary base over seven years.

As to generosity, we would adopt the words of Professor Martin Friedland in his study for the Canadian Judicial Council, A Place Apart: Judicial Independence and Accountability in Canada, at p. 56:

[T]he greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary,

we would still want to pay judges well to ensure their financial independence - for our sake, not for theirs.

In accordance with Section 45 of the Framework, the annual base salaries shall be adjusted by the AIW on the first day of April in each year according to the formula set out therein.

BENEFITS AND ALLOWANCES

Allowances

1. Representation Costs

Section 13(c) of the Framework requires each Triennial Commission to recommend benefits and allowances as well as salaries. The main argument with respect to benefits and allowances was over representational costs. The position of the judges was that there is a constitutional requirement for this Commission to award reimbursement of representation costs incurred as a result of their participation in the hearings before the Commission. In particular, counsel relied on the decision of Roberts, J. in Re Judges of the Provincial Court of Newfoundland et al. and the Queen in Right of Newfoundland, 1998, 160 D.L.R. (4th) 337. In analyzing the decision of the

Supreme Court in the P.E.I. Reference, supra, Roberts J. emphasized that the independent tribunal envisaged by the Supreme Court, and mandated under the Framework in Ontario, required a determination through a hearing process "that is one step removed from the judges themselves". In ordering funding for the judges, Roberts J. held as follows:

"For this dialectic [the hearing process] to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way that the executive and/or the legislature must be represented. Is it right and just, then, that the executive and/or legislative branches of government be represented by persons whose services are paid for out of the public purse while those who represent the judicial branch are not? I think not....

For the system to work as envisaged, equity dictates that both parties to the process be funded, not just one."

The judges rely on the decision of Roberts, J. to ask for funding for the costs of the hearing before this Commission as a benefit or allowance.

Counsel for the Government sought to distinguish the Newfoundland decision in two ways: first, there was no Framework Agreement in Newfoundland "which comprehensively set out the terms and conditions of the relationship between the two branches in the context of

a compensation committee". Second, the Newfoundland Supreme Court noted that there were only 23 members of the Provincial Court in that Province, and it would be inequitable to impose the costs of a Commission on so few judges. By contrast, there are over 200 judges in Ontario over which to spread the costs of participation.

It is somewhat difficult to appreciate how the fact of the Framework, with its detailed provisions for a triennial commission, effectively decides the issue of the payment of the judges' representation costs. The fact that the Framework is silent on the issue is in no way determinative. The costs of a lengthy hearing, with voluminous exhibits, such as took place before this Commission, are very high. Whether the cost is spread over a small or a large number of judges, does not answer the question of what is equitably, and perhaps constitutionally, required. We are in agreement with Roberts, J. that it is neither right nor just that the executive be represented by persons whose services are paid out of the public purse, while those who represent the judicial branch are not. This is particularly so in a context where a hearing is statutorily required every third year, and a hearing process is constitutionally mandated as determined by the Supreme Court in the

P.E.I. Reference. In that context, we are of the opinion that the representation costs of the judges should be paid as an allowance by the Government for each triennial hearing.

There is nothing in the decision of the Supreme Court of Canada in the Alberta Provincial Judges' Association case (December 24, 1998) that holds to the contrary. We do not agree, as the Government argued, that the holding by the Supreme Court in that case was that representation costs were not a constitutional necessity. The Court simply held that the issue did not arise before it as a result of its prior decision in the P.E.I. Reference. What the Court said was:

The court is of the opinion that the motion for direction [on costs] should be dismissed with costs and that it does not arise from the implementation of the judgment of the Court.

The Supreme Court was clearly of the opinion that it was within the jurisdiction of the compensation commissions to determine the issue of reimbursement in the context of the particular form and procedure established for the determination of compensation. As those procedures may vary, "so will the approach to the payment of representational costs of the judges".

In following the dictates of the Supreme Court, and the Newfoundland decision, supra, we hold that it would be fair, equitable and reasonable, in the context of this hearing under the Framework, that an allowance for costs be determined. We direct that counsel for the parties attempt to agree on an appropriate cost figure. If counsel cannot agree, or if it is felt that negotiation with respect to costs violates the dictates of the P.E.I. Reference, supra, we will remain seized of the matter and will hear submissions as to costs.

2. Expense Allowance and Robes

The judges currently receive an allowance for expenses of \$2,000 per annum, including robes, and ask for an increase to \$2,500, to match the Federal judges, and to replacement robes every seven years. We see no reason to increase the expense allowance of \$2,000 per annum, but would grant an entitlement to new robes every seven years.

Benefits

1. Dental Plan

The judges request 100% reimbursement for basic services (now 85%) and 75% reimbursement of dentures,

major retractions and orthodontics (now 50%). The Government argues for the maintenance of the co-insurance principle, and says that the judges are simply cherry picking when they note that some provinces have 100% coverage for basic services and up to 80% coverage for major restorative work. We agree that there should be some principle of co-insurance, and would leave the reimbursement of basic services at 85%, but increase the coverage for major restorative work, dentures and orthodontic costs, to 75%, as it is those costs that may bear most heavily on the judges.

2. Implants

Implants are not currently covered by the Plan, and the judges ask that they be included with a reimbursement, as for other major restorative work, of 75%, with a cap of \$2,000. We would grant this request, as implants are becoming a more common form of restoration.

3. Drug Plan

The judges ask an increase from coverage of 90% of drug costs to 100%. We are of the opinion that 90% is reasonable, as the Government pays 100% of the premium for this benefit.

4. Vision Care

The current supplemental vision plan provides a benefit of \$200 payable every two years, with the judges paying 40% of the annual premium. The judges request the benefits be increased to \$400 per annum, and that the current premium costs be frozen. The payment of \$200 every two years for eyewear seems somewhat low in the current marketplace, and we would increase it to \$400 every two years and require the judges to pay 30% of the cost of the annual premium.

5. Hearing Aids

The existing benefit is \$200 lifetime, and the judges argue that that is seriously inadequate. They argue that the current cost of hearing aids can run from \$1,000 to more than \$3,000. Such a benefit would not be expensive in any benefit plan because of the low incidence of use. We are of the opinion that the request of \$1,500 every five years is reasonable, and we so award.

6. Physiotherapy Coverage

The current plan provides \$12 per visit to various paramedical practitioners (physiotherapists, podiatrists, naturopaths, etc.), up to a maximum of \$1,000 per year per type of practitioner. We would set the reimbursement at \$25 per visit once the annual coverage under OHIP expires.

7. PA Tests

The judges ask for coverage for this test, whose annual cost is in the \$40 to \$50 range. We do not think that specific coverage is required.

8. Life Insurance

The judges were concerned with insurance coverage for those judges who continue to work but who are no longer eligible for the basic life insurance coverage. We think that the request for life insurance of at least one times salary coverage for judges who continue to work is a reasonable one, and we so award. We would also award the requested \$10,000 death benefit, arranged as a self-insured benefit.

9. Annual Vacation

We agree that the annual vacation should be increased from six weeks to eight weeks, and we so award.

PENSIONS

A judge of the Provincial Court currently receives a pension of 45% of salary at age 65, with 15 years of service. A judge who has more than 15 years of service accrued before the age of 65, receives an additional 1% per year for every year of service

beyond 15 years. He/she also receives an additional 1% of pension for every year worked past age 65 through to 75. The judges contribute 7% of salary, and the cost to the Government is 27% of payroll. Counsel for the judges emphasized that pensions are a critical component of judicial compensation. If they are inadequate, it will act as a significant deterrent to accepting an appointment to the Provincial bench.

Once again, the comparator raised by the judges was the pension paid to the judges of the General Division. Federally appointed judges have a pension of 66-2/3% of salary at age 65 after a minimum of 15 years of service, and also contribute 7% of salary. They may also elect supernumerary status, in which they have a reduced workload with full compensation up to age 75. In addition, a Rule of 80 factor is being introduced for Federal judges for early retirement before age 65 without penalty (that is, years of service and age must equal 80). Not only is there not a Rule of 80 for Provincial judges, there is an early retirement reduction factor of 5% per year between the ages of 60 to 64, and 2% per year between the ages 55 to 59. In the submission of the judges, the pension differences are so substantial that even if the salaries were the same, appointment to the Provincial bench would be far less attractive than a federal appointment. The argument of the judges was, once again, for parity with their federal counterparts.

It is recognized that judicial pensions, on a comparative basis, are expensive to fund. This is because judges are usually not appointed to the bench until significantly later in their careers, and their rate of accrual, as compared to other pension plans, must necessarily be considerably higher. It also explains why federal judges receive a full pension after 15 years of service. The higher accrual rate and the resultant high cost is an inherent feature of any judicial pension plan. But it is one of the necessary costs of a high-quality, respected justice system that attracts the ablest in the profession to a judicial appointment.

Previous Committees and Commissions that have dealt with pensions have focused on a replacement ratio of 75% of salary at retirement "when taxes, OAS and CPP are taken into account", as that was the goal set by the 1984 Report of the Provincial Courts' Committee. And it was that pension plan that the then-Government essentially implemented. Henderson (1988) recommended a 10% increase across-the-board, which would have lifted the pension to 55% at age 65 after 15 years of service. That recommendation was not implemented. Henderson (1992) commissioned an actuarial study. The study provided seven options to the Commission which ranged from no change to adopting the Federal pension plan. Henderson recommended no change in the entitlement, but said that for years of service beyond 15 accrued before the age of 65, the pension should increase by an additional 1% of

salary per year. This recommendation was implemented, but the Government continued to take no action on the Henderson (1998) recommendation of a 10% increase.

Counsel for the judges submitted that even in terms of the adoption of the 1984 Committee recommendation of a 75% replacement ratio at retirement, the current Ontario plan falls short of that goal. A chart was submitted comparing provincial and federal appointees at age 43 who elect to retire at ages 63, 65 and 70, with salaries assumed to be at their present levels. The chart shows that for a Provincial judge to reach a replacement level of 75%, he/she would have to rely on personal savings of 27% at age 63, 12% at age 65, and 7% at age 70. A federal appointee, on the other hand, would have to rely on only 4% of personal savings at age 63, and 0% personal savings at both ages 65 and 70 to achieve a replacement rate of 75%. It was submitted that such a heavy reliance in Ontario on pre-retirement savings makes the 75% goal unattainable. This was particularly so, it was argued, given that the average age of appointment in Ontario is now 43 years. The argument was that in the early years of one's professional practice and of raising a family, it is difficult to accumulate a significant amount of savings in the pre-appointment period.

The Government submitted that unlike salaries which will erode over time unless they are inflation-protected (such as

through the automatic AIW), pensions will not erode as they are automatically protected by the fact that the benefit formula is based on final salary at retirement and indexed thereafter. Accordingly, a change was not required. The change in 1991 was because of a change in demographics, that is, the increasingly younger age at appointment. Accordingly, there was an addition of 1% annual accrual for service in excess of 15 years before age 65. There is currently no such demographic shift and, it was submitted, no other changes which would justify a departure from the plan which was recommended and accepted in 1991. The Government also strongly contended that when one takes into account pre-appointment savings, the target of a replacement ratio of 75% of final salary at age 65 was either met or exceeded.

The dispute between the submission of the judges on the one hand and that of the Government on the other as to obtaining the goal of 75% replacement cost turned on the assumed level of pre-appointment retirement savings. The Government relied on the 1991 Joint Actuarial Report and Henderson (1992) in arguing that it was reasonable to assume a significant level of pre-appointment savings. The actuarial assumption used was zero RRSP contributions for the first five years of an appointee's career, and 85% of the maximum thereafter. The submission of the judges, it was argued, does not acknowledge any pre-appointment accrual. Given its estimated pre-appointment savings, the Government

charts indicated replacement rates equalling or exceeding the 75% target for all appointment ages. Assuming an appointment age of 45, which is close to the norm, the Government considered that a pre-appointment RRSP would provide 18% of the indicated replacement rate of 77%, and would rise to 23% for appointment at age 50 for the same replacement rate. For the Government's indicated replacement rate of over 80% at age 70 for those appointed at 45 years, 50 years, and 55 years, the assumed pre-appointment RRSP percentage contribution would be, respectively, 20%, 25% and 30%.

The Government also emphasized that on its calculation of the retirement rate achieved, and taking into account the 75% replacement target recommended in 1984 and adopted by Henderson (1992), the judges' current plan exceeds its own target and is very generous when applied against public and private pension plans in general.

There was sharp disagreement on the part of the judges with respect to the Government's assumptions as to pre-appointment RRSP savings - an assumption, as noted, that is critical to the calculation of its retirement rate. The judges, in a reply submission, said that the Government's assumed commencement of practice at age 25 is too low by some three years. And its assumed average starting income of \$65,000 was far too high as lawyers in private practice, either as associates, in sole

practices or in small partnerships, tend to have relatively low incomes in their early years. The Government's actuarial assumptions assumed no RRSP contributions in the first five years of practice, and contributions of 85% of the maximum thereafter. The judges took issue with that assumption based both on what it considered an over-estimation of earnings in the early years of practice, and the demands on lawyers' income through their 30's and early 40's as families grow.

The Government's submission with respect to appointees at age 40, 45 and 50 assumed a pre-appointment RRSP contribution of 12%, 18% and 23% to achieve a replacement ratio of 76/77%. The judges submitted that it would be relevant to consider the amount of capital that that would represent in today's dollars. It calculated that the amount of capital that would have to be available in 1999 to the 40, 45 and 50-year-old appointee today was, respectively, \$227,000, \$457,000, and \$817,000. It submitted that "lawyers at those ages do not have that amount of capital, or anywhere close to it, available in RRSPs today." Taking the Government's model and substituting what it considered more realistic figures, and correcting what it suggested were errors in the Government's model, the judges took the same ages of appointment, 40, 45 and 50 years, and a 65-year retirement age, and arrived at replacement ratios of 59% and 66% depending on whether the assumed RRSP contribution level was 50% or 85%. The replacement ratios for an appointee at 45 years, which is near

the current average age (43) at appointment, were 62% and 64%.

Most importantly, the judges submitted that pre-appointment savings were irrelevant when considering a comparison to the Federal pension plan, which it urged us to do. It emphasized that the guaranteed replacement ratio of the Federal plan, irrespective of OAS, CPP, and any pre-appointment RRSP savings, is 66-2/3%. It suggested that if one used the Government's assumptions for pre-appointment RRSP savings, and added them to the replacement ratio in the Federal plan, the Ontario plan would still be significantly behind at every level. That is, the gap between the Federal plan and the Ontario plan is very large, given that the Federal plan is so much higher in the first instance, notwithstanding any argument concerning pre-appointment RRSP savings.

DECISION

The statistical battle between the submissions of the Government and those of the judges is not possible of resolution for the very reason that it is based on assumptions. Moreover, and most importantly, we think that it begs the essential question. That question, in our view, is: What pension replacement ratio is necessary to attract a cross-section of the ablest men and women at the bar to the Provincial bench? The

pension ratio is as important, and arguably more important, than the base salary. This is so because of a younger appointment age, and longer life after retirement. If, as we indicated in our base salary decision, it is essential to have a remuneration package that is attractive in terms of comparison with federal judicial appointees, then the current Ontario pension plan needs revision.

As with the salary level, the matter of pensions must be seen in the context of what is, in effect, a single Ontario Court of Justice. It is, in our view, absolutely essential that the Ontario pension plan be seen to be as attractive as the Federal plan. Absent that, the hard reality is that the Provincial bench will not be as attractive as the Federal bench. And that is simply not acceptable in the arena of the criminal law. It is widely acknowledged that one of the main reasons senior, highly remunerated practitioners are willing to accept a federal judicial appointment at a greatly reduced salary, is because of the generous pension plan. The goal of doing away with a hierarchy of courts in Ontario, and attracting the same high quality of practitioner to the bench, regardless of the court, will not be attainable without a substantial revision to the pension plan. The mandatory implementation of our salary recommendations, without implementation of our pension recommendations, would not be sensible social policy.

Mindful that our recommendations as to pensions are not

binding, we would urge one of the following three options on the Government for improvement in the judges' pension plan, to be effective April 1, 1999. We would repeat that we regard the matter of pensions as being extremely important. The increase in salary that we have put in place will, by itself, be inadequate to provide a level of remuneration that will attract the desired quality of practitioner to the Provincial bench. It is critical that there be a concomitant improvement in the pension plan.

1. The first option would be to move the Provincial plan to the level of the Federal plan, that is, a replacement ratio of 66-2/3% at age 65 after 15 years of service, with a 7% contribution rate. There is a good deal to be said for moving to the Federal plan, as the current provincial goal of a 75% replacement rate at retirement depends on very generous assumptions as to pre-appointment RRSP contributions. We tend to agree with the submission of the judges that given that the average age of appointment in Ontario is now 43 years, it is difficult to assume that there will be, in most cases, significant pre-retirement savings. It is doubtful that that is the case in the first 12 to 15 years of one's career when building practices and families through that time period. The current annual cost of the Ontario pension plan is \$9,449,000. The additional annual cost of introducing the Federal plan is estimated at approximately \$4,816,000. The increase from \$9.5 million to

\$14.3 million seems to us to be both a reasonable and manageable annual increment - indeed, it is relatively minor, to achieve such an important social goal.

2. The second option is to move to a 20-year accrual rate of 3.3%. This is what was recommended by Professor Friedland in his 1995 study for the Canadian Judicial Council, A Place Apart: Judicial Independence and Accountability in Canada, p. 66. In Professor Friedland's opinion, a 20-year accrual period was reasonable for the Provincial judges to reach a 66-2/3% pension. That would mean an effective accrual rate of approximately 3.3%, which would be an increase above the current Ontario accrual rate of 2.5% over a 20-year judicial career between ages 45 and 65. If the Government does not wish to move immediately to a 66-2/3% replacement ratio, then we recommend that it move the current Ontario plan from an accrual rate of 2.5% for a 45-year-old appointee retiring at 65 years, to a 3.3% accrual rate. Any current members of the Provincial bench who might have a higher entitlement under the current Provincial plan would need to be grandfathered. Of course, if a Provincial judge retires before 15 years of service, he/she would have a smaller pension. There will be some who achieve 20 years of service prior to age 65 and might not get a full pension even with a 3.3% accrual rate. Without considering here the Rule of 80, some thought will have to be given to what, if any,

actuarial reduction should be put in place for those who leave before age 65 with 20 years of service or less. To repeat, the main point of Professor Friedland's conclusion was that a Provincial judge should be able to retire at age 65 after 20 years of service with a 66-2/3% pension, representing a 3.3% annual accrual rate. The additional cost of this recommendation is slightly less than the straight move to 66-2/3%, being estimated at \$4.5 million. That would mean an annual cost of \$13.9 million, as against the current \$9.449 million.

3. A third option, and one that we would stress is not nearly as desirable as options 1 or 2, is an across-the-board increase on the lines recommended by Henderson (1988). He recommended that the entire range of percentages be increased by 10% so that a judge retiring at age 65, appointed at age 50, would receive 55% of salary, as opposed to the current 45%. Although this would be an improvement, it would still be significantly under the Federal plan of 66-2/3%. The estimated annual increased cost is \$2,932,000.

Whichever of the three options are chosen, and we would hope that the Government would choose one of them, and preferably option 1 or 2, the increased annual costs are not great. The benefits to the Provincial judicial appointment process would, however, be enormous. Whichever option is chosen, consultation

with the judges will be required to work out appropriate implementation. The important thing is an agreement in principle, with an effective date of April 1, 1999.

RULE OF 80

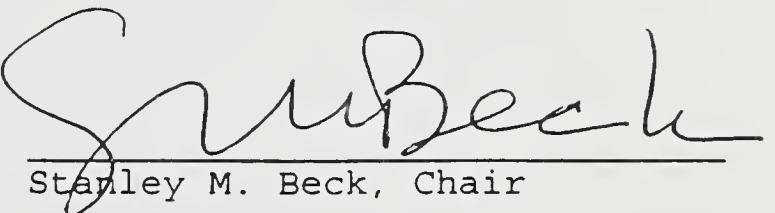
The Rule of 80 under the Federal plan provides for retirement before age 65 without penalty if the years of service and the judge's age equal 80. With an earlier age of appointment becoming common, we think this is a beneficial rule to encourage retirement and regeneration of the bench. Under the Federal plan, a judge is required to serve at least 15 years in order to be eligible for the early retirement option, and we would recommend the same for Ontario if the Rule of 80 is brought into play, as we recommend. To quote the Scott Commission, "...In a changing world, there is a constant need for rejuvenation of the Bench by younger persons expressive of current views. Renewal must be systemic so as to ensure that the profile of the Bench is expressive of contemporary societal values. The result is, as has been recognized by successive Governments, that the appointment process can no longer be seen as a mere matter of finding suitable candidates for office who are at the end of their careers." We agree with those sentiments, and urge that the Rule of 80 be enacted.

EARLY RETIREMENT REDUCTIONS

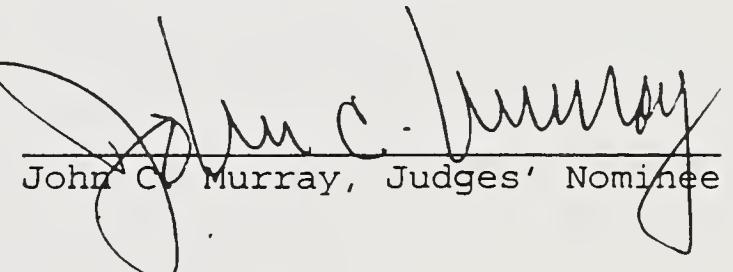
The Rule of 80 which we recommend must be seen in the context of the current penalties for early retirement under the Ontario plan. Under the current plan there is a penalty of a 5% reduction in pension for every year between ages 60 to 64 that a judge takes early retirement, and an additional 2% per year for early retirement between ages 55 and 59. If there is to be a reduction, it should certainly be lesser for retirements closer to age 65 and greater for those further away from 65. That is the opposite of the current plan, and makes early retirement very unattractive. We recommend that a Rule of 80 be enacted, and that the early retirement reductions be eliminated. If they are not eliminated, they should be restructured at reduced levels, with the lower percentages coming the closer one gets to 65 years. One option that the judges suggested is that the current reduction factors be reversed, such that there would be a 5% reduction between ages 55 and 59 and only 2% between ages 60 and 64. If

there is to be a reduction factor, we agree with the suggestion for reversal of the current plan.

DATED at TORONTO this 20th day of May, 1999.

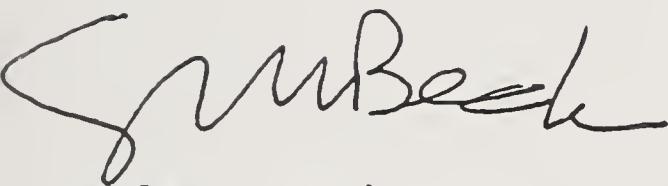

Stanley M. Beck, Chair

See attached Minority Report
Valerie A. Gibbons, Government of Ontario's Nominee

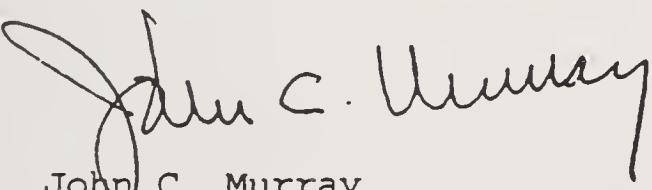

John C. Murray, Judges' Nominee

ADDENDUMAdministrative Salaries

Currently there are seven Regional Senior Judges, two Associate Chief Judges and one Chief Judge for the Ontario Court of Justice (Provincial Division). These judges all receive a salary greater than Puisne Judges. The current differential between the salaries of these judges and the salary of a Puisne Judge shall be preserved to the extent possible except that in no case shall the salary of a Regional Senior Judge, Associate Chief Judge or Chief Judge exceed the salary of a Puisne Judge of the Ontario Court (General Division).



Stanley M. Beck, Q.C.



John C. Murray

FOURTH TRIENNIAL REPORT OF THE
PROVINCIAL JUDGES REMUNERATION COMMISSION (1998)

ADDITIONAL REASONS - REPRESENTATION COSTS

FOURTH TRIENNIAL REPORT

ADDITIONAL REASONS - REPRESENTATION COSTS

1. Background

The Fourth Triennial Report of the Provincial Judges Remuneration Commission (1998) (the "Report") was delivered to Management Board of Cabinet on May 20, 1999. The Commission was constituted pursuant to the Courts of Justice Act, 1994, R.S.O. 1990, c. 43, s. 51.13, and the Framework Agreement (the "Framework") contained in Appendix A to the Act, which governs the terms of reference and jurisdiction of each of the Triennial Commissions. As we noted in the Report, it is the essence of the Framework that it deals with the relationship between the Executive Branch of the Government and the Provincial Court Judges ("the Judges"), including a binding process for the determination of the Judges' compensation. A Commission's recommendations with respect to salaries, benefits and allowances, but not pensions, "have the same force and effect as if enacted by the Legislature".

Section 13(c) of the Framework requires each Triennial Commission to recommend benefits and allowances, as well as salary. The Report concluded that "the representation costs of the Judges should be paid as an allowance by the Government for

each Triennial hearing". In so concluding, the Report indicated that it was following what it considered to be the dictates of the judgment of the Supreme Court of Canada in Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island (the "PEI Reference"), [1997] 3 S.C.R. 3, and of Roberts, J. in Re Judges of the Provincial Court of Newfoundland et al. and the Queen in Right of Newfoundland (1998), 160 D.L.R. (4th) 337, that "it would be fair, equitable and reasonable, in the context of this hearing under the Framework, that an allowance for costs be determined". Accordingly, we directed counsel for the parties to attempt to agree on an appropriate cost figure. If counsel could not agree, we stated that we would remain seized of the matter and would hear submissions as to costs.

2. Additional Reasons - June, 1999

Following issuance of the Report, counsel for the Ontario Judges' Association (the "Association"), pursuant to Section 28 of the Framework, sought amendment and clarification of the Report with respect to two matters - administrative salaries and representation costs. As to representation costs, counsel for the Association requested that any allowance for costs be paid in the aggregate to the Executive of the Association and through it to counsel, rather than from each individual judge to counsel.

Counsel for the Government took the opportunity to argue again that representation costs were not within the ambit of the term "allowance" as that term is used in Section 13(c) of the Framework. Moreover, it was argued that since Section 17 of the Framework states that the Commission may retain professional and support services but is silent as to representation costs for the Judges, an award of costs was not contemplated by the Framework and was therefore beyond the jurisdiction of a Triennial Commission.

In our Additional Reasons, we repeated that we considered representational costs to be an appropriate allowance for the Judges for all the reasons set out at pages 50-54 of the Report. We also concluded that there was no reason why a direct allowance should not be paid directly to the Executive of the Association, rather than being paid in individual lump sums to some 250 Provincial Court Judges to then be passed on to counsel. There was no reason to handle the matter of an allowance for costs in such an inefficient manner. As Commissioner Gibbons dissented in the Report as to salary levels and the awarding of representational costs, she did not join in the Additional Reasons.

3. Representation Costs

In the event, counsel could not agree as to an appropriate

amount for costs. Accordingly, the matter was submitted to the Commission for decision. The total of the legal, actuarial and other consulting fees, including disbursements, incurred by the Association, was \$667,914.49. A breakdown shows legal fees of \$558,891.27, including \$20,098.87 for disbursements. Consultants' fees, including disbursements of \$2,451.12, were another \$109,023.22. In arguing for full payment of the Association's costs, counsel cited the judgment of the Supreme Court of Canada in the Provincial Court Judges (No. 2) to the following effect:

The composition and the procedure established for hearings before the independent, effective and objective commission may vary widely. So will the approach to the payment of representational costs of the judges....Suffice it to say, whatever may be the approach to the payment of costs, it should be fair, equitable and reasonable.

Counsel submitted that the fees and expenses of the Association met those three tests and should be reimbursed in full. More specifically, counsel argued that the issues involved in the case were of fundamental importance to the administration of justice in Ontario and that a broad range of issues were required to be canvassed, including the entire history of the compensation of the Judges. In that context, the work of many lawyers over a very substantial number of hours was justified "...to meet the onus of persuading the Commission to make a fundamental change in compensation policy".

To understand the reason for the relatively high level of the costs, it was necessary to appreciate the nature of the argument made in the case. Counsel for the Association expressed it as follows:

The position taken by the Judges that there should be equality of treatment as between provincially and federally appointed Judges had not been previously accepted through any adjudicative process. In order to accomplish that goal, it was necessary to undertake an extraordinary effort to marshal all of the historical, equitable and social policy reasons why that result was the proper result in all of the circumstances. In this regard, it was necessary to deal with the entire history of the treatment of the compensation of Provincial Court Judges, particularly in the last 30 years, and to deal extensively and respond to the reasoning and approaches of previous Triennial Commissions, as well as the many Commissions held in other provinces over the years. All of the previous reports of prior Ontario Commissions, the submissions of these parties to those Commissions in Ontario, the submissions of other Associations and governments in other provinces, the reasons of Commissions in other provinces, as well as the Federal Judicial Commissions, had to be analyzed, parsed, distinguished and/or marshalled in support of the important public policy position which was ultimately adopted by the Commission. Very importantly, detailed care and attention had to be paid to researching and explaining the increasing jurisdiction in criminal matters of Provincial Court Judges under the Criminal Code, including the evolution of case loads in both the Superior Court and the Provincial Court.

As to the use of experts, pensions are obviously a matter of great importance to the Judges, and counsel took the position

that it was necessary not only to understand and explain the existing Judges' pension plan, but also the history of the plan and the changes that have been made to it. It was argued that "complex alternate pension proposals had to be considered, formulated, costed, revised and explained". Similarly, a benefit consultant was retained to identify benefit options, alternatives and costs, and an economic consultant was engaged to deal with issues surrounding the state of the provincial economy.

In summary, counsel for the Judges argued that it was felt that the 1998 Commission was the time to make the case for equality of treatment with Judges of the Ontario Superior Court. The Ontario economy was robust, the Judges had not had a pay increase, other than the agreed cost-of-living increases, since 1991. Accordingly, a major review was undertaken. The fact that these efforts resulted in substantial success, although not parity, justified the approach taken. And it was an approach that necessarily resulted in costs that were of a considerable magnitude greater than the costs incurred in previous Triennial Commission hearings.

As to the relatively high level of costs, counsel contrasted the situation before this Commission with the case of the First and Second Triennial Commissions. As counsel noted, in those instances there were public hearings in the nature of an Inquiry or a Royal Commission, with submissions presented by many groups

around the province. The Commissions travelled and had administrative and research staff, including retained actuaries.

By contrast, there was not a large administrative burden on the current Commission as the overwhelming burden of the work was undertaken by the Association through its counsel and experts. In short, it was argued that the process before the Commission was more in the nature of an interest arbitration than a public inquiry. This meant that the research, documentation, arguments and policy considerations were set before the Commission by each of the parties. Accordingly, the Commission's direct costs were substantially less than previously and the parties costs, particularly those of the Association for the reasons noted, were appreciably higher.

4. THE GOVERNMENT'S SUBMISSIONS

The essential Government position was that it was not appropriate for the Government to pay all the costs associated with the Judges' participation in the process. It was only reasonable that the Judges should make some contribution to those costs. As the argument^{by the Judges Council} for the payment of representational costs was that the Judges should be able to participate on an equal ^{therefore} footing with the Government, it follows that the Government should not have to pay for Judges' counsel at higher hourly rates

than those paid for lawyers representing the Government. Nor should the hours billed exceed those billed by the Government's lawyers. It was also instructive to consider how other Provincial Commissions have treated costs, as well as the recent decision of the Federal Judicial Compensation and Benefits Commission (the "Federal Commission"). The Federal Commission recommended that 80% of the Judges' costs be paid by the Federal Government to a maximum of \$230,000. In the case of other provincial commissions, the highest costs awarded had been \$160,000, with the others being far below that figure.

The Government's arguments, in somewhat more detail, were as follows:

1. The Government Should Not Pay All Costs Incurred By The Judges

Counsel particularly compared the Government's costs to those of the Judges. The legal and consultant costs incurred by the Government amounted to \$202,393.05 in total. Counsel acknowledged that the Government had access to internal resources with respect to actuarial expertise. Assuming it had to retain those services, \$80,250.58 was added to the Government's costs for a total notional amount of \$282,643.63. Applying some reduction for taxation principles, that figure would be reduced to \$262,580.98. That, it was argued, should be the maximum

amount for the Judges, as it would allow them to participate on an equal footing with the Government. That would leave \$405,533.51 to be funded by the Judges.

Counsel for the Government also quoted with approval the decision of the Federal Commission to the effect that "...some contribution should be made by the Judiciary to their overall representational costs, through an application of a portion of their membership fees in the Conference." As noted, the ultimate decision was that 80% of the Judges' total costs should be paid by the Federal Government.

2. Equal Footing Implies Equal Hourly Rates and Equal Number of Hours

It was argued that if the purpose of a representational allowance is to allow the Judges to participate on an equal footing with the Government, then it follows that the maximum hourly rate paid by the Government should be the maximum allowed for counsel retained by the Judges. Similarly, reimbursement for hours spent should not exceed the number of hours for which the Government paid its own lawyers. The Government paid its lawyers for a total of 705.5 hours, whereas the account submitted by counsel for the Judges was for 1594 hours' work. Accordingly,

it was argued that an appropriate amount would be "an allowance for legal costs that equals the amount paid by the Government for its legal services...to allow the Judges to participate in the Commission proceedings on an equal footing with the Government". If, as argued, the reimbursement for legal fees should not exceed the amount paid to Government lawyers, and applying taxation principles, the maximum allowance would be \$262,580.98.

3. Taxation Principles

It was argued that the taxation principles applicable in ordinary litigation should be applied here. It was the Government's submission that the end result would be the same. That is, if taxation principles were applied to the Judges' total bill of \$667,914.49, it would be reduced to \$262,580.98. The standard taxation principle in awarding costs is to grant an amount that partially indemnifies the adverse party ("party-and-party" cost assessment). Cost assessment is not intended to provide complete indemnification. Accordingly, certain items are "taxed off" by the Courts, and only costs which are "reasonably necessary" are allowed to stand. With respect to experts' costs, to be allowable those fees must be reasonable, reasonably incurred and reasonably

necessary. And the onus is on the claiming party to prove those elements.

4. Costs Paid in Other Canadian Jurisdictions

Counsel emphasized once again that the Supreme Court of Canada held in Provincial Court Judges (No. 2) that while each jurisdiction's approach regarding the payment of Judges' representational costs may vary, the approach taken must be "fair, equitable and reasonable". In determining whether the costs asked for meet that test, it is appropriate to examine the quantum of representational costs that have been reimbursed in other jurisdictions. In Alberta in 1998, Judges' costs were \$159,000 for counsel and \$75,700 for consultants, for a total of \$234,700. The Commission determined that the reasonable costs to be borne by the Government should be \$160,000. In reducing the bill, the Commission felt that some of the expert evidence was "largely of an advocacy character" and that some of the counsel participation also was more of an advocacy character rather than just providing the Commission with "unvarnished fact and opinion".

In Newfoundland, the Newfoundland Supreme Court held that the Government was obligated to provide funding for "adequate representation, subject to

"review by either a Taxing Master or a Judge of the Supreme Court of Newfoundland". In the case of British Columbia, Saskatchewan, Manitoba and Nova Scotia, the costs were all well under \$100,000, although no information was provided as to the extent of the proceedings in each case.

The only other significant award of costs referred to was that of the Federal Commission. The Federal judiciary's costs were \$270,000. The Federal Commission stated that it had "reviewed that breakdown [legal fees and disbursements and experts' costs] and all related particulars in detail" and concluded that the costs incurred were reasonable. The Federal Commission's decision was "that the Government should be responsible for payment of 80% of the total representational costs incurred....", such amount not to exceed \$230,000.

5. JUDGES' REPLY SUBMISSION

Counsel for the Judges argued once again that "the nature, breadth and complexity of the argument and the result all justify the increased amount of expenditure". Accordingly, in the particular circumstances, it was submitted that 100% of the Judges' costs should be borne by the Government. As to the

concept of "equal footing", it was argued that there was nothing either in principle or logic to limit counsel and the consultants representing the Judges to exactly the same hours of work as counsel for the Government, and at the same rate of pay. The complexity of the case and the nature of the argument may vary from Commission to Commission, and there was no necessary correlation between work done for the Judges as opposed to work done for the Government. The ultimate test, it was submitted, was "whether the work undertaken by counsel and consultants for the Judges was necessary or excessive in all the circumstances".

With respect to taxation principles, it was argued that the principles that are rooted in the adversarial system and the rules surrounding allocation of costs between parties where one party is successful in Court, have no application to the sort of public inquiry that takes place before a Triennial Commission. That process is one of public policy-making "adopted in the public interest, in order to facilitate and advance the interests of the proper administration of the system of justice in the Province of Ontario". In that light, it was argued, the only question for the Commission was whether the expenditures incurred "were necessary, proper and appropriate with respect to assisting the Commission in determining the issues before it".

6. DECISION

Having considered the arguments for the parties, we agree with the position taken by the Federal Commission. That is, we think it appropriate that the Judges pay a portion of their total costs. As with the Federal Commission, we think that 20% is appropriate in a case such as this. Accordingly, it is ordered that the Government pay 80% of the total costs and disbursements, including experts' fees, as submitted. That is, 80% of \$667,914.49, which is \$534,331.59. That would leave some \$133,582.90 to be paid by the approximately 250 members of the Association, or some \$534.00 each, which we regard as an entirely reasonable amount.

In reaching our conclusion, we are conscious that the costs incurred by the Judges in this case were far beyond what has been incurred in any other Federal or Provincial Judicial Commission. However, as submitted by counsel for the Judges, the nature of this case went quite beyond what had been presented before previous Triennial Commissions. As noted, the Judges' salaries, apart from cost-of-living, had been effectively frozen since 1991. The Judges felt that the time had come to review their position in the context of the Judiciary in Ontario, the changes that had taken place in their jurisdiction relative to the Judges of the Superior Court, and to review the entire history of their compensation. In short, it was felt that the time had come for a

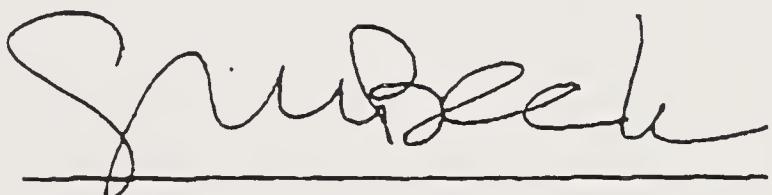
very extensive review of and, it was hoped, change in the economic position of the Judges in the judicial framework in Ontario. We agree with that position and would comment that we found the extensive evidence and written argument presented to be of great help in our deliberations. Indeed, we are conscious that our decision was a far-reaching one and was justified for all the social, economic and public policy reasons set out in our Report. In that context, we find that the costs incurred were fair and reasonable.

We do not think that the taxation principles of the adversarial process are appropriate to a review of the costs incurred in a public inquiry such as the one before the Fourth Commission. The test, as enunciated by the Supreme Court of Canada, is whether the costs incurred were fair, equitable and reasonable. In our opinion, they were. We reject the argument that "equal footing" must mean that the rates paid and hours worked by counsel for the Judges must be identical to those of counsel for the Government. There is no necessary correlation between the hours and the costs of the parties, and neither logic nor principle requires such a symmetry. To repeat, the essential test is one of reasonableness in all of the circumstances of the particular case.

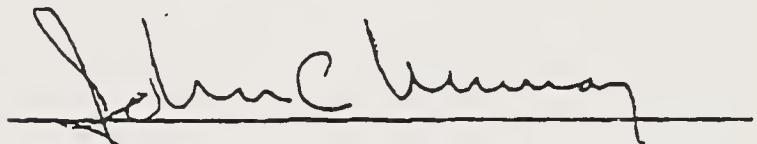
We award the Judges 60% of their total billed costs of \$667,914.49, to be paid by the Government to the Association.

As Commissioner Gibbons dissented in the Report with respect to both the matters of salary levels and the awarding of representational costs, she does not join in this Award with respect to representational costs.

DATED at TORONTO this 18th day of September, 2000.



Stanley M. Beck, Chair



John S. Murray, Judges' Nominee

Minority Report

Fourth Triennial Commission

Valerie A. Gibbons
Commissioner
May 20, 1999

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Introduction

It is with the greatest respect for my colleagues on the Commission and for the parties and the quality of the presentations that I submit my Minority Report.

In its report the Fourth Triennial Commission has outlined the role of the Commission and summarized the positions of the parties appearing before it. It is not my intention to repeat this material unless in my opinion, I believe there to be an error of fact or that a different conclusion could be drawn from the information provided.

The Commission derives its authority from the Framework Agreement negotiated between the Judges and the provincial government and enshrined in the *Courts of Justice Act, 1984*. The legislation provides the Commission with the power to make binding recommendations with respect to salaries, benefits, and allowances. Recommendations with respect to pensions are not binding on the government. The agreement also sets the Judges' salary at 124,250 and makes provision for an automatic indexation of the Judges' salaries to the AIW.

Section 25 of the Framework Agreement sets out certain criteria, which the Commission must consider when making recommendations on compensation. The section reads as follows:

"The parties agreed that the Commission in making its recommendation on provincial Judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

- a) *The laws of Ontario*
- b) *The need to provide fair and reasonable compensation for Judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,*
- c) *The growth or decline in real per capita income,*

- d) *The parameters set by any joint working committees established by the parties.*
- e) *That the government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence.*
- f) *Any other factor which it considers relevant to the matters in issue*

This framework also recognizes the Judges of the Provincial Court as a separate and independent branch of government and not as employees of the Executive.

Although the federal government and all other provinces have some form of arms-length tribunal to deal with the issue of compensation for the judiciary, Ontario was originally a leader in this regard. It was the first province to have a truly independent binding Commission and continues to be one of only two provinces in the country to do so.

Comment on Background

The Fourth Triennial Commission provides a brief overview of the salary history of the Judges from the first Provincial Courts Committee in 1980 to the Third Triennial Commission in 1997, including the Framework Agreement and the Contribution Agreement. Three impressions left by this section require comment:

- the salary gap with respect to the federally appointed Judges has widened considerably;
- the Judges have experienced a real erosion in their financial worth; and
- all governments have ignored the recommendations of previous Commissions.

1. Salary Gap

While it may be true to say that the federal Judges have historically and continue to be compensated at a higher level for work that is not dramatically different, all recent Commissions both federally and provincially have expressly rejected the argument for parity. In addition, Commissions have actually gone further to indicate that

- it would be wrong to make an automatic linkage; and
- remuneration in matters of this nature should be the sole purview of the provincial government.

'The next step in the argument is the one we cannot take. Even assuming the duties assigned to the two courts are equivalent, it does not follow that Provincial Court Judges ought to receive the same amounts as the federal government now pays to the District Court Judges. Neither does it follow that Provincial Court Judges' salaries ought to be expressed as a function of the salaries of District Court Judges. We have reached these conclusions for three reasons.

First, we cannot accept that if the two groups deserved the same salary, the salary they deserve is the one that the higher paid group is now receiving; that position needs independent support. This Committee, however, has been given neither the information nor the authority to satisfy itself that the Judges of the District Court are at present being paid appropriately: for all we know, it may be that they are paid too much or too little. The salary District Court Judges receive cannot, therefore, be binding on a salary recommendation that comes from us.

Secondly, we cannot ignore the fact that the two groups of Judges are paid by different levels of government and that those levels of government have different powers and responsibilities. Unlike the federal government, which pays District Court Judges, the government of Ontario does not have plenary powers of taxation and has no authority to regulate interest rates or the money supply. These distinctions alone would suffice to justify Ontario in having different fiscal priorities from those of the federal government and in being somewhat more cautious about expenditures generally. In addition, federal and provincial governments are accountable independently to their electorates. As a result, judicial remuneration scales that may in order for one level of government may be thought to be inappropriate for the other. Any salary recommendations for Judges paid by Ontario have, therefore, to reflect the conditions that obtain in Ontario. To that extent we agree with the Ontario government and with the Ontario Law Reform Commission."

(Extract from First Triennial Commission Report, p.67)

"The majority of the submissions made to us, both written and oral, recommended that the level of payment to a Provincial Judge should equate to that of a judge of the Ontario Court, General Division. It was stressed before us that the responsibility of a Provincial judge in the judicial system has been enlarged since the First Report. The expression 'a judge, is a judge, is a judge' recurred in the submissions. The Commission is not prepared to accept the principle of equality which would require the level of compensation to Provincial Judges to be raised to the level of compensation payable to General Division Judges. We do not purport to comment as it would be inappropriate for us to comment on the level of payment to Judges of the General Division. Without further evidence, we are not prepared at this time to recommend the adoption of the principle of the equality. Each level of judicial responsibility and remuneration should be considered on its own merits."

(Extract from Second Triennial Commission Report, p.8)

2) Salary Erosion

Over the past three decades the salary situation of the Judges has evolved significantly, from the beginning position of \$10,500 to the current level \$130,810, with a provision for automatic annual indexation. Over the past 28 years, the Judges' salaries have increased 545 percent while the CPI has only increased by 409.5 percent. In addition, between 1987 and 1998 Judges' salaries increased by \$46,000 or roughly 54 percent, with two significant increases occurring in 1989 (18.5 percent) and 1992 (12.5 percent, retroactive to 1991). In the face of this information it is hard to conclude that there has been any real erosion in their financial worth.

3) Response to Recommendations

While it could be said that Government's responses to the recommendations of its Commissions were not timely, it would be inaccurate to say that it failed to respond at all. In reality the two increases referenced above came as a direct response to the recommendations of the 1988 and 1991 Commissions.

*"For purposes of this report, we're prepared to accept the work assigned to Provincial Court Judges is, on the whole, of equivalent responsibility, volume and complexity to that assigned to those on the District Court. The volume of cases Provincial Court Judges have to deal with is more than three times as great as the volume imposed on the District Court; very serious cases and cases with complex facts or law seem *prima facie* no less likely to arise before the one bench than before the other.*

Extract from First Triennial Commission, pp. 66-67

"There is simply too little trustworthy information on which to base an appraisal of those numbers' real significance. Many of the Judges and lawyers who made submissions to us reminded us of the range of tasks outside the court room that are integral parts of the work of judging: reading and researching the law on a regular basis, dealing in chambers with preliminary and procedural matters; writing occasional reasons for judgment; traveling to and from remote communities. Because of the growing difficulty introduced into Provincial Court matters by the Charter of Rights, the Young Offenders Act and ever more complex provincial and federal regulatory legislation, Judges, according to these informants, are having to spend an increasing amount of time on research and preparation outside the court room..."

Extract from Second Triennial Commission, p. 9

"... the role played by Provincial Judges, while it has always been important in the administration of justice in Ontario, has become increasingly more so both as to the level of responsibility being thrust upon them and as a result of the increased in case load they have been required to carry. That became apparent from a review of the history of the Court set forth in the Reports and in the written submission of the Judges Associations.

Extract from Third Triennial Commission

Finally, the Framework Agreement negotiated between the Government and the Judges in 1992 set the base salary at 124,250 and provided for annual indexation to the AIW, a significant benefit not enjoyed by Judges in other provinces. This agreement allows the Commission to make binding recommendations for salaries, benefits and allowances, a significant concession by the Government and also a benefit not enjoyed by most Judges in other provinces.

It is important to note that prior to the Framework Agreement, the provincial Government was not bound by the recommendations of its Commissions. In fact earlier Commissions had commented that, decisions of governments with respect to compensation adjustments, should be made with regard to their unique circumstances.

“In addition, federal and provincial governments are accountable independently to their electorates. As a result, judicial remuneration scales that may be in order for one level of government may be thought to be inappropriate for the other. Any salary recommendations for Judges paid by Ontario have, therefore to reflect the conditions that obtain in Ontario. To that extent we agree with the Ontario government and with the Law Reform Commission.”

Extract from First Triennial Commission, p. 67

Discussion: Nature of Work

It has been and continues to be the essential position of the Judges, before this and other Commissions, that the gap between the salaries of the Provincial Division Judges and the General Division Judges should be eliminated. All other Commissions, including the present Commission, have emphatically rejected this position.

The Judges make their claim based on three primary factors:

- Increased jurisdictional responsibilities over criminal, family and constitutional matters;
- Nature of the work is similar to the work undertaken by Judges of the General Division; and
- Increased workload.

The report of the Fourth Triennial Commission covers in some detail the jurisdictional responsibilities of the Judges and presents the arguments for both parties. The Commission concludes that major changes in jurisdictional responsibilities have occurred and to a significant extent these changes have had the effect of transferring cases formerly dealt within the General Division to the Provincial Division.

"On a consideration of the statistics, and considering counsel's arguments as to what they actually indicate, we are of the opinion that fully three-quarters of what was previously a 'significant and difficult' caseload in General Division has been transferred to the Provincial Court and this, by itself, must have a significant impact on its workload. It is not just a matter of the number of cases, but also of the type of case, as one is talking about the most serious criminal offenses that were traditionally within the exclusive preserve of the General Division, or were chosen to be proceeded with in the general division by crown counsel."

Extract from the Fourth Triennial Commission, Page 26.

With respect, in my opinion, the central issue is not so much whether there have been changes in jurisdictional responsibility over the last thirty years but rather when did these changes occur and what has been the impact on workload.

As noted in the report of the Commission, the arguments presented by the Judges mirror substantially their presentations before previous Commissions. It is the Government's position that the major increases in compensation recommended by the First and Second Triennial Commissions, and ultimately

acted on by the Government, are an acknowledgement of this fact. The following excerpts would appear to support this position:

Extracts from Judges Brief, 1988, to the First Triennial Commission:

"In recent years changes in the Federal and Provincial family law legislation have resulted in increasingly complex and difficult cases being heard in Provincial Court (Family Division). The Provincial Court has exclusive jurisdiction in the area of wardship pursuant to the Child and Family Services Act. Wardship is a significant part of the work of the Provincial Court of (Family Division) consisting of approximately 27 percent of its volume over the past several years. Since the 1984 amendment expanding the definition of a 'child in need of protection' the wardship cases have become increasingly more complex and challenging. Two and three week trials have become common in this area "

(Extract from Judges 1988 Submission, Reply Appendix, Vol. 1at Tab 8, page 28)

"The impact of the Charter of Rights has been greatly felt in the Provincial Court [Criminal Division]. It is now the rare case where a Charter argument is not made at trial. As over 97 percent of all criminal matters in the province or disposed of in the Provincial Court (Criminal Division) its Judges have the task of defining the Charter of Rights and making it relevant to the citizens of Ontario".

(Extract from Judges' 1988 Submission, Reply Appendix, Vol.1, page 23)

"The expansion of the Provincial Divisions jurisdiction as a result of offence reclassification, the passage of the Charter of Rights and other legislative and systemic change outlined above, inevitably meant the work of the Court became more difficult complex and time-consuming. The Provincial Division took on the new responsibility of trying more serious offenses, hearing difficult Charter motions, and conducting more complex procedural and sentencing hearings as a result of the barrage of legislative amendments passed in the last five years."

(Extract from Judges Submission, Reply Appendix Vol.1, Tab.8, p. 23)

Response of the First Triennial Commission:

"For many Ontario citizens the Provincial Court is the embodiment of the administration of justice, when they meet the court as parties or as witnesses. This is the court in which the rule of law becomes a reality to the majority of individuals. Because it is so important, the Provincial Court must in every sense be more accessible to the people of the province than are the higher courts.

...

For these reasons, the life of a Provincial Court judge can differ in several respects from the life of a judge of a higher court. All court proceedings deal regularly with fundamental human concerns; in Provincial Court, however, one on sometimes finds a rawness, even a desperation, rarely found in other courts. Because a Provincial Court's primary purpose is to deal in volume with cases the system expects will be legally straightforward, the work of a Provincial Court judge historically has drawn heavily on common sense and basic good judgment. In the past several years however complex regulatory matters, more aggressive defense tactics and the introduction of the Charter of Rights have transform the Provincial Court into a forum where legal decisions are required to be more sophisticated."

The Third Triennial Commission also noted the workload of the Judges but determined that in light of the economic conditions at the time, an increase was inappropriate. They did not, however, recommend that the next Commission review the base salary established in the Framework Agreement. Instead they suggested the Fourth Triennial Commission look at reinstating the AIW for those years during the Social Contract when Judges salaries were frozen. They suggested as well that pensions be studied again.

In my opinion, the above would appear to indicate that due consideration was given to the arguments of the Judges by the First and Second Commissions and that the 18 percent and 12 percent increases awarded in 1989 and 1992, but effective April 1989 and 1991, were intended to reflect this.

Changes in Jurisdiction/Workload

As indicated below, minimal changes in jurisdiction have taken place since the last Commission. Change that have been implemented with respect to Family Law have actually resulted in a diminished, rather than increased, workload.

Family Law

It was noted in the Government's submission that Counsel for the Judges before the First Triennial Commission outlined the jurisdiction of the Provincial Court in family matters to be as follows:

"The Ontario Provincial Court (Family Division) has been granted jurisdiction over all areas of family law except that jurisdiction exclusively conferred to the District and Supreme Court by s. 96 of the Constitution Act, 1867. The Provincial Court (Family Division) now exercises concurrent jurisdiction with the District and Supreme Courts in the matters of custody, access and support. The Provincial Court (Family Division) enjoys exclusive jurisdiction over wardship; child protection; criminal matters involving young offenders, both under federal and provincial legislation under the age of 16; enforcement of orders pertaining to support, custody and access, both from its own courts and other courts including foreign courts and; marriage; changing of name; guardianship of children's property; and adoption. As a whole, the Provincial Court (Family Division) exercises the jurisdiction over more areas of family law than any other court in the province, or in fact in the other provincially appointed courts in Canada, with the exception of the Unified Family Court of Ontario.

Extract from Judges 1988 Submission, Reply Appendix, Volume one, Tab 8, p. 27

The limitations to the jurisdiction of the Family Court described above continue to exist and no further enhancements have been introduced since the 1988 submission.

In fact with the introduction of the Unified Family Court in 1977, as a branch of the General Division, the responsibilities of the Provincial Division have been diminished in five major cities of the province. The percentage of family law business currently in the Provincial Court is 53 percent a drop of 22 percent since 1988. Once the announced expansions are fully implemented this figure is expected to decrease to 39 percent. It is the stated intention of the federal government to gradually expand the Unified Family Court across the province and to remove all family cases from the Provincial Division.

It is also the position of the Judges that the work they are doing in the family area is identical to the work performed by the General Division in the area of family law. While the work can be described as similar it would be inaccurate to say that it is identical given the areas of exclusive jurisdiction granted to the federal Judges by the Constitution. In addition there is the potential, through the recent amendments to the *Courts of Justice Act*, for the Regional Senior Justices to rotate family Judges of the Family Branch to undertake other kinds of work within the jurisdiction of the General Division. As this begins to occur, the jurisdictional differences between the two courts will further increase.

Civil Jurisdiction

Some small increases to the monetary jurisdiction of the Small Claims Court have occurred since the Judges' submission in 1988. The workload impact of these changes is not viewed as significant.

Criminal Jurisdiction

The Judges argue that the steady movement of offences from the General Division to the Provincial Division through classification, hybridization,

penalties or accused election has dramatically increased the percentage of more serious, indictable offences appearing before the provincial bench. Counsel for the Judges attempts to leave the impression that cases formerly handled by General Division are now being managed by the Provincial Division, resulting in a net workload increase.

However, in my opinion these are not cases being added to the Provincial docket since they had to come through the Provincial Division to get into the General Division in the first place. In actual fact, cases that were formerly dealt with by preliminary inquiry in the Provincial Division are now being dealt with by trial or guilty plea in the Provincial Division.

In addition to the impression that this is new workload, Counsel also tries to leave the impression that only the General Division was able to try these cases and that the Provincial Division had no jurisdiction. In reality, since the major expansion of jurisdiction that occurred in 1972, the Provincial Division has been able and has tried serious and complex cases with the exception of certain offences such as murder which can still only be tried in the General Division.

In fact, contrary to the conclusion of the Fourth Triennial Commission not all serious and complex cases were tried in the General Division and not all cases that went to the General Division were serious and complex. For example, as indicated by the Assistant Deputy Minister, Criminal Law Division, in his remarks to the Commission, it was not an uncommon practice for the accused even in minor cases to opt for a General Division trial. This occurred because it afforded the accused the opportunity through the preliminary inquiry to see the case against him, to hear witnesses and to look for inconsistencies that could be used later in his/her defense. It was exactly this misuse of the system that resulted in the provincial government lobbying for the changes that would keep the accused from electing for General Division trial in relatively minor cases.

In order to really understand the changes that have occurred in the Provincial Court, one must evaluate them in the context of the Investment Strategy. The information provided to the Commission indicates that as a result of the case management approach, dictated by the Investment Strategy:

- the number of trials before the court has gone down;
- the number of preliminary inquiries has gone down; and
- the rate of early resolution by withdrawal or guilty plea has gone up.

It is true perhaps, that the trials may be more complex, but this might also be said of the General Division. I would argue that the Provincial Division is dealing with cases that are more likely to be resolved, while the General Division is in fact handling those that are more serious and that were unresolvable by the Provincial Division..

“...when the initiative began, the percentage of cases resolved prior to setting a trial date in the Province was 58 percent. This figure has now reached as high as high 75 percent in the third quarter of 1998. In particular, the percentage of cases where the accused plead guilty before a trial date was set change from 27 percent, when the investment strategy began, to 32 percent in the third quarter of 1998. The percentage of cases that actually went to trial when the initiative began was 11 percent. Since the initiative, the trial rate has been lowered to a range within 8- 9 percent. These results represent a significant achievement in Crown efforts to improve the overall efficiency of case flow through the Provincial Division and, in particular, to reduce unnecessary trials, shorten trial by resolving issues and disposing of matters earlier in the process.”

(Extract from Reply Submissions On Behalf Of the Government of Ontario 1998)

With respect to the percentage of the criminal caseload disposed of by the Provincial Court, there appears to be some dispute about the figures. There is agreement that it was somewhere between 93 or 95 percent in 1988 and is now around 98 percent. At dispute, however, is whether this 3 or 5 percent increase

has led to a dramatic increase in workload. As the Chair of this Commission says 'it is always difficult to deal with statistics.'

Perhaps what is more significant in evaluating workload is the actual number of sitting days in court. The average number has remained constant for the period 1994-1998 at 177 for three out of the four years. The average sitting hours in court increased by 0.2 hours or 12 minutes per day. To some extent, workload has been maintained on this level due to the significant increase in Judges appointed (39) by the government to serve exclusively in the Provincial Court Criminal Division. In any case, 12 minutes per day could hardly be characterized as a significant increase in workload. I could find no comment by Counsel for the Judges on this point so I am assuming they are in agreement with the figures.

Figure 1

Provincial Court Judges – Average Sitting Hours and Average Days Judges Sitting 100 Days or More

Fiscal Year	Number of Judges	Average Days in Court	Average Hours Sat in Court
1994/95	251	177	4.1
1995/96	239	177	4.2
1996/97	237	179	4.3
1997/98	245	177	4.3

(source: Reply Submissions on Behalf of the Government of Ontario, December 16, 1998 p.34)

In summary, with respect to the position of the Judges, I am of the opinion that:

- Jurisdiction of the Provincial Court remains much as it was in 1988;
- While the work of Provincial Court Judges may be similar in some respects it cannot be called identical;
- Jurisdiction and workload were considered by previous Commissions in making their recommendations;
- The changing mix of work undertaken by the Provincial Court has not resulted in "dramatically increased workload";
- Additional appointments to the bench have offset any perceived workload increases;
- Average sitting days have only increased marginally; and
- The case for parity has not been made.

The Framework Agreement

The composition and functions of the Provincial Judges Remuneration Commission are set out in Appendix A of the Framework Agreement. The criteria the Commission must consider in making its recommendation are contained in paragraph 25.

"The parties agreed that the Commission in making its recommendation on provincial Judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

- a) The laws of Ontario*
- b) the need to provide fair and reasonable compensation for Judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,*
- c) The growth or decline in real per capita income,*

- d) *The parameters set by any joint working committees established by the parties,*
- e) *That the government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence,*
- f) *Any other factor which it considers relevant to the matters in issue*

In its report, the Fourth Triennial Commission argued that items (b) and (f) were the most “overriding and relevant criteria” and spent considerable time on these two areas. Although I do agree that not all criteria have the same importance, I believe that paragraph (c) should have been included as a relevant factor for this Commission. I will refer to this section and others as I comment on the position of the Commission.

State of the Economy

The Fourth Triennial Commission reviewed in general the positions of both parties with respect to the “prevailing economic conditions of the province”. The Commission concluded that in its opinion “there is no case for restraint based on the condition of the provincial economy, or expenditure restraint by the Government itself”. In its decision they were persuaded by the optimistic forecasts of the Government, the tax reduction strategy and its cost implications and the pattern of new initiatives announced in the 1998 Budget.

There is no doubt that the condition of the economy has improved since the last Triennial Commission, and continues to show signs of robustness. What has not improved is the debt load. The general response to the most recent Budget indicates there continues to be wide spread concern from many sectors about both the size of the debt (\$105 billion) and the annual fiscal deficit (\$ 3.2 billion).

The Government's stated commitment to eradicate the deficit was recently enshrined in the *Tax Payer Protection and Balanced Budget Bill*, introduced in the final days of the last session of the legislature. This commitment anticipates another \$1 billion in expenditure cuts.

This administration relied heavily on the tax reduction strategy to build confidence, stimulate growth and increase revenues. Its position has been that annualized expenditures have been targeted to respond to critical public policy issues, such as Health and Education. For operating Ministries, however, most other approved expenditures have actually been either:

- one-time in nature;
- cost shared;
- targeted to a specific initiative such as research/technology, or
- for initiatives that will occur in future years.

The Government has continued to restrain its own direct expenditures as evidenced by the dramatically reduced number of public servants (16,260 reduction over three years) and the salary awards for those who remain. The Government continues to restrain the extent to which Broader Public Sector organizations can significantly increase salaries, through the annual allocation process. This has resulted in public sector wage settlements that averaged 0.3 percent in 1997 and 1.5 percent by the end of the third quarter of 1998. In addition, public sector salaries continue to lag behind the Consumer Price Index. (see *Appendix A* for various tables.)

To summarize, in my opinion there continues to be an environment of restraint even in the face of the current buoyant economy.

Factors in the Decision

1. Salaries and Wages

Ability to Attract and Retain Qualified Candidates:

The central thrust of the Judges' brief before this Commission has been that the salary disparity between provincially and federally appointed Judges should be eliminated. This approach and the arguments provided are consistent with the information presented to the First, Second, and Third Triennial Commissions. These Commissions seriously weighed and rejected the argument for parity. In the report of the First Triennial Commission, Henderson went further to say that it would be inappropriate to link provincial judicial remuneration with federal judicial remuneration. While acknowledging that financial security was an essential component of judicial independence he added that "to be attractive the salary need not – and should not be excessive" (*emphasis added*). In addition he ranked the most important factor when setting judicial remuneration to be "the ability to attract and retain candidates of the highest quality".

While the Fourth Triennial Commission has accepted that there should not be an automatic linkage with the federally determined salary for Judges, it stated that it was time to narrow the gap substantially. In its decision, it considered several factors including the salary of federally appointed Judges, the salaries of provincial deputy ministers and the remuneration level of practicing members of the provincial bar. However, the Commission relied most heavily on the view that "the current level of \$130,000 acted as a disincentive to the ablest men and women at the bar".

In my view there is absolutely no empirical evidence to support this claim. To the contrary, as outlined in the Government's submission, there continues to be a high number of qualified applicants for judicial appointment. In 1997, there

were 852 applications, over 65 percent of whom came from criminal or family law practices. In 1998 there were 926 applicants, with almost 70 percent coming from a criminal or family law practice. Between the years 1989 and 1997 a total of 1636 new applications were received for a relatively small number of vacancies.

To date there is no perceptible diminution in the quality of provincial Judges. This was acknowledged by Counsel for the Judges in his presentation to the Commission: "the fact that prosecutors and accused persons who have the right to proceed in the General Division elect to remain in the provincial Division in such numbers is an impressive display of confidence in the caliber and abilities of Provincial Division Judges". (M.Code p.79 Original Submission.)

2. Deputy Minister Salary

The Commission in its decision makes the point that Judges are to the Provincial Court as Deputy Ministers are to the Provincial Civil Service. Each, although performing vastly different functions, hold leadership roles with respect to their areas of responsibility and are considered senior officials in their respective areas.

The Commission further states that the Crawford Commission (Federal, 1992) made the following point:

"We believe that an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of the federal public service, the Deputy Minister 3, commonly referred to as DM-3. As the two previous Triennial Commissions have also indicated, the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and Judges".

Using this position the Fourth Triennial Commission describes what it believes to be the salary range for the provincial Deputy Ministers. In my opinion the

information provided is inaccurate. The Commission identifies the range for DM's salaries to be \$175,000-195,000. In fact the salary range for the provincial Deputy Ministers is \$143,650-165,550. The most senior of provincial public servants the Secretary of Cabinet has a different range and this salary not the range was accurately reported as \$195,000.

The information provided by the government to the Commission indicated that the average salary for pension purposes for Deputy Ministers serving a full year was \$156,000 in 1997 and \$157,000 in 1998. The salaries used by the Commission in its decision were obtained from the annual disclosures required under the Public Sector Disclosure Act. These figures contain salary but also other items such as retroactive payments, vacation pay outs, termination and severance payments and incentive compensation. The important figures then for calculating the mid-point, as recommended by Crawford, would be \$143,650-\$165,550. The mid-point would be 154,600.

Once a Deputy Minister has reached the maximum, the salary for pension purposes never increases. In addition the actual incentive payment will vary from year to year depending on the total incentive package available and the extent to which the performance objectives for the year have been reached to an envelope maximum of 10 percent.

The award that has been granted by the Fourth Triennial Commission in my opinion is excessive and far exceeds any other salary adjustment awarded by colleague Commissions and governments across the country.

In addition to contradicting its own support for a mid range solution as recommended by Crawford, it places the Ontario Judges in April 1, 2000 at \$170,000 some \$18,000 above the next highest paid provincial judge in Canada and some \$68,000 higher than the lowest paid provincial judge across the country. Furthermore, it exceeds the salary range of the Ontario Deputy

Ministers by almost \$5000. When the AIW is applied to the base salary these figures will escalate significantly.

The Fourth Triennial Commission acknowledges that automatic linkage should not be made with the federally remunerated Judges, and concedes that the province has a responsibility to its own taxpayers. However, in this important area it appears to ignore these facts in its decision and for all practical purposes has awarded parity.

Much has been made in the report of the Fourth Triennial Commission about the erosion of the financial position of the Judges. This erosion is offered as the rationale for "being generous" at this point. In this regard it is important to note that between 1987 and 1998 Judges' salaries increased by \$46,000 or approximately 54.3 percent with some major adjustments in 1989 and 1992 (18 percent and 12 percent). These particular adjustments were awarded in recognition of the increased volume and complexity of work in the Provincial Court.

In addition Ontario Judges, unlike other groups paid from provincial revenues, are entitled to an automatic increase in salary every year. This adjustment is intended to ensure that the Judges' salaries are increasing at an equivalent pace to average wages across Canada, a benefit not shared by those in other provincial funded positions.

If one examines the annual increases of Judges between 1987 and 1998 in relation to other Ontario public sector workers covered by collective agreements, one concludes that Judges have done reasonably well.

As well if one examines the Judges' salary increases since 1970, they have greatly exceeded increases in the cost of living. It would be my opinion that there has

been a substantial growth in their real per capita income, rather than an erosion in their incomes.

In conclusion, it is my opinion that the award being recommended is not supportable in the light of the many factors stated above. It is perhaps instructive to return to the comments of the First Triennial Commission with respect to attracting and retaining candidates of highest caliber.

"To be attractive, the salary need not – and ought not to – be excessive. It must, however, be sufficiently generous to offset the financial and social restrictions Provincial Court Judges must endure as a cost of ensuring their independence." (emphasis added)

"It is neither necessary nor desirable to establish judicial salaries at such a level as to match the Judges' earnings before appointment to the bench. The most obvious reason for this is that such a policy would tend to attract people to the bench for purely financial reasons. The sort of person who would accept a position on the bench because it paid well is not the sort of person who would make the best judge. Rather, the sort of person we would wish to see on the bench are those who appreciate the honour of being a judge and who see as a part of their reward the satisfaction of serving society on the bench." (emphasis added)

2. Benefits and Allowances

Benefits

The package of benefits that the Judges receive is consistent with the benefits for all other public servants including the Deputy Ministers. For the most part these benefits are competitive with those paid in the marketplace. In my opinion these benefits should not be adjusted except where there is a clear indication that this is not the case.

Two areas in particular I believe fall into this category:

- Implants, as they are not currently covered by the plan and
- Hearing Aids where the plan appears not to be competitive with the marketplace.

In these areas perhaps some changes could be made. However, in all other areas I believe the benefit levels are appropriate.

I would like to comment on the Commissions intention to award a vacation benefit of 8 weeks. This exceeds the benefit provided to provincial Judges in most other jurisdictions and the vacation entitlement of Ontario public servants who receive a maximum of 5 weeks. A Deputy Minister after 18 years of service is entitled to 6 weeks vacation. The award appears excessive and unwarranted.

Allowances:

The biggest issue with respect to Allowances is representational costs. Although I have not seen the final version of the Fourth Triennial Commission's recommendation on this point, I understand that it has decided that the Government should pay representational costs but that the specific arrangements would be left to the parties to negotiate. The Commission will remain seized of this issue until the parties report back with a decision. It is not clear to me that the Commission actually has the authority to comment in this area. In addition, previous Commissions have denied the Judges this request.

While it could be concluded that the PEI Reference case leaves the door open for paying representational costs, in an appropriate case, the Supreme Court is clear that any costs awarded should be placed in the unique situation of the province concerned. With respect to Ontario, I would observe that the Framework Agreement is most relevant situation.

The Framework Agreement deals with costs that the Government is prepared to absorb. However, these costs are only those born by the Commission in carrying out its functions. Had the parties intended that the government would cover the costs of such a substantive area as representational costs, it can be assumed that some reference would be made to this point in the Framework Agreement. As with the situation in other provinces, this may only be resolved by a referral to the appropriate court.

3. Pensions

The report of the Fourth Triennial Commission reviews in some detail the positions of both parties with respect to pensions. It is not my intention to restate these positions here except to note that the current plan resulted from the efforts of a joint committee of actuaries representing all parties. Their report was received by the Second Triennial Commission which subsequently accepted one of the recommended design options. The Government in turn accepted the recommendation of that Commission.

It is important to note that the actuaries representing all parties agreed to the assumptions underlying the model. In particular the assumption with respect to pre-judge employment and accrual of savings.

"It is our opinion that the adequacy and appropriateness of benefits, as measured by replacement ratios should be the primary initial focus. One of the key issues would appear to be the extent to which a pension accrual prior to becoming a judge can be assumed. Clearly, as mentioned earlier, it is consistent with the principles outlined and which underlie this report, to assume an accrual of pre-judge employment and that that assumed accrual should increase as entry age increases, in developing estimated replacement ratios."

(Extract from the Joint Actuarial Report, October 1991)

“In the plan to be adopted, the actuaries considered it appropriate for the Commission to assume that with a minimum of ten years of practice for eligibility for appointment, some retirement fund would have been accrued in the pre-judge employment period; again, we agree”.

(Extract from the Response of the Second Triennial Commission)

The Fourth Triennial Commission appears to have some difficulty with the fact that statistical arguments for both sides are based on assumptions. I would argue that all pension plans are based on assumptions and that, if there is a perceived problem with the assumptions, the best solution might be to revisit them. In fact, the Third Triennial Commission recommended that the “present pension arrangements be studied again”.

Instead, the Fourth Triennial Commission returns to theme of “attracting the ablest men and women at the bar to the provincial bench”. It concludes that:

“it is absolutely essential that the Ontario pension plan be as attractive as the Federal plan. Absent that, the hard reality is that the Provincial bench will not be as attractive as the Federal bench. And that is simply not acceptable in the area of criminal law, where the citizen most often faces the power of the state”.

Again I argue that there is absolutely no empirical evidence to suggest that the Provincial Court is having any difficulty with respect to their capacity to recruit candidates of the highest quality.

In summary, if there continue to be concerns with respect to the adequacy of pension, I recommend the present pension arrangements be reviewed rather than accept the recommendations of the Commission to adopt one of the three options identified by them. The cooperative approach, utilized in 1991, appeared to work successfully could, perhaps, be used again. I am aware however, that the recommendations with respect to pensions, made by the Commission or in a Minority Report, are not binding.

Appendix A

Collective Bargaining Highlights for June and September 1997

Source: Submissions on Behalf of the Government of Ontario, November 26, 1998 pp. 26-31

Employer	Union	Average Annual Wage Increase
Bruce County Board of Education (Secondary)	Ontario Secondary School Teachers	1.7%
Carleton University (Academic Staff, Librarians)	University Professors	0%
Dufferin-Peel RCSSB (Teachers Assistants)	Independent Local Union	0%
Durham Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Durham Region RCSSB (Secondary)	Multi-Teachers Associations	0.6%
Elgin County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Essex County Board of Education (Elementary)	Multi-Teachers Associations	1%
Essex County Board of Education (Secondary)	Ontario Secondary School Teachers	1.2%
Halton Board of Education (Elementary)	Multi-Teachers Associations	0%
Hastings County Board of Education (Elementary)	Multi-Teachers Associations	0%
Hastings County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Kent County Board of Education (Elementary)	Multi-Teachers Associations	0%
Kent County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Kent County RCSSB	Multi-Teachers Associations	0%

Employer	Union	Average Annual Wage Increase
Laurentian University (Academic Staff, Librarians)	University Professors	0%
London City Board of Education (Secondary)	Multi-Teachers Associations	0%
London Middlesex County RCSSB (Occasional Teachers)	Ontario English Catholic Teachers	1.1%
Middlesex County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Nipissing District RCSSB (Elementary)	Enseignants Franco-Ontariens	1.7%
Norfolk Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Ottawa Board of Education (Education Support Staff)	Ontario Secondary School Teachers	0%
Ottawa Board of Education (Education Assistants)	Ontario Secondary School Teachers	0%
Peel Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%
Perth County Board of Education (Elementary)	Multi-Teachers Associations	0%
Perth County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Renfrew County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Simcoe County Board of Education (Elementary)	Multi-Teachers Associations	0.5%
University of Ottawa (Academic Staff, Librarians)	University Professors	3%

Employer	Union	Average Annual Wage Increase
Victoria County Board of Education (Elementary)	Multi-Teachers Associations	0%
Victoria County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Waterloo County Board of Education (Elementary)	Multi-Teachers Associations	0.5%
Waterloo County Board of Education (Secondary)	Ontario Secondary School Teachers	0.5%
Wellington County Board of Education (Elementary)	Multi-Teachers Associations	1%
Wentworth County Board of Education (Elementary)	Multi-Teachers Associations	1%
Wentworth County Board of Education (Secondary)	Ontario Secondary School Teachers	1%

- In this same issue of "Collective Bargaining Highlights", four settlements were reported in the Health and Social Services Sector, with two of these agreements providing for a 0% average annual increase, one agreement providing for a 0.7% average annual wage increase, and the fourth agreement providing for an average annual increase of 2.2%.
- 24 collective agreements concluded in the Education Services Sector in September 1997, the majority of which provided for an average annual wage increase of 0%, with the maximum average annual wage increase for this group being 0.9%. Overall, the average increase in the 35 public sector contracts reported that month was 0.5% (see summary at

Employer	Union	Average Annual Wage Increase
Carleton RCSSB (Occasional)	Ontario English Catholic Teachers	0%
Carleton University (Office)	Canadian Public Employees	0.3%
Dufferin County Board of Education (Secondary)	Ontario Secondary School Teachers	0.9%
Dufferin-Peel RCSSB (Occasional)	Ontario English Catholic Teachers	0%
Durham Board of Education (Educational Assistants)	Canadian Public Employees	0%
Durham Board of Education (Elementary)	Multi-Teachers Associations	0%
Durham Board of Education (Office, Clerical, Technical)	Canadian Public Employees	0%
Elgin County Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%
Halton Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Lakehead Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%
Leeds and Grenville County Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%

Employer	Union	Average Annual Wage Increase
Leeds and Grenville County Board of Education (Secondary Occasional)	Ontario Secondary School Teachers	0%
London City Board of Education (Elementary)	Multi-Teachers Associations	0%
Nipissing Board of Education (Elementary)	Multi-Teachers Associations	0%
Nipissing Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%
Nipissing Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Ontario Council of Regents (Support Staff)	Ontario Public Service Employees	0.5%
Oxford County Board of Education (Secondary)	Ontario Secondary School Teachers	0%
Scarborough City Board of Education (Secondary Occasional)	Ontario Secondary School Teachers	0%
Simcoe County Board of Education (Secondary)	Ontario Secondary School Teachers	0.5%
Toronto City Board of Education (Elementary Occasional)	Ontario Public Service Employees	0%
Toronto City Board of Education (Secondary Occasional)	Ontario Public Service Employees	0%
York Region Board of Education (Elementary Occasional)	Ontario Public School Teachers	0%

Employer	Union	Average Annual Wage Increase
York Region Board of Education (Secondary)	Ontario Secondary School Teachers	0%

- 18 public sector collective agreements concluded in October 1997, with an average annual increase of 0.6% (see summary at Tab 23 from Collective Bargaining Highlights October 1997).
- 65 agreements (of 175 Participating Hospitals) covering 29,745 employees concluded in May 1998 with the Ontario Nurses' Association which provided for an average annual wage increase of 1% for the two-year period from April 1, 1996 to March 31, 1998 (see summary at Tab 24 from Collective Bargaining Highlights May 1998).

IN THE MATTER OF THE COURTS OF JUSTICE ACT AND IN THE MATTER OF
AN INQUIRY BY THE PROVINCIAL JUDGES REMUNERATION COMMISSION
(1998) INTO THE COMPENSATION OF PROVINCIAL COURT JUDGES

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF ONTARIO

(the "Government of Ontario")

- and -

THE ONTARIO JUDGES' ASSOCIATION, THE ONTARIO FAMILY LAW
JUDGES' ASSOCIATION AND THE ONTARIO PROVINCIAL COURT
(CIVIL DIVISION) JUDGES' ASSOCIATION

(the "Judges")

BEFORE:

Stanley M. Beck, Chair
Valerie A. Gibbons, Government of Ontario's Nominee
John C. Murray, Judges' Nominee

APPEARANCES:

On Behalf of the
Government of Ontario:

Roy C. Filion, Counsel
Frances R. Gallop

On Behalf of the Judges:

C. Michael Mitchell, Counsel
Steven M. Barrett
Michael Code

HEARINGS:

November 26, 27, December 16, 17, 18, 1998
January 19, 28, February 4, 15, 1999

FOURTH TRIENNIAL REPORT OF THE
PROVINCIAL JUDGES REMUNERATION COMMISSION (1998)

ADDITIONAL REASONS

FOURTH TRIENNIAL REPORT - ADDITIONAL REASONS

These additional reasons to the Fourth Triennial Report of the Provincial Judges Remuneration Commission (1998) ("the Report") are issued pursuant to a request of the Ontario Judges' Association ("the Association") pursuant to Section 28 of the Framework Agreement for amendment and clarification of the Report. The amendments or clarifications sought are in respect of the following two matters:

1. ADMINISTRATIVE SALARIES

In our Report we stated that the administrative salary differentials for the Chief Judge, Associate Chief Judge and Regional Senior Judges should be maintained, with the exception that they should be capped at the salary base of the puisne Judges of the Ontario Superior Court. The effect of that is that they would be capped at \$178,100. The current salary for the Chief Judge is \$149,497, for the Associate Chief Judge \$146,383, and for the Regional Senior Judges \$143,720. As the current base salary for a Judge of the Provincial Court is \$130,810, it will be appreciated that the administrative differentials are in the range of \$13,000, \$16,000 and \$19,000. In the year 2000, which is the third and final year in which the recommendations of the Report are implemented, the base salary becomes \$170,000, plus

the AIW increment. With a cap of \$178,100, it will be appreciated that there will be a very little differential for administrative positions.

We are asked to reconsider our decision with respect to administrative salaries on the basis of it being appropriate to maintain a differential, as is the case in the Superior Court. The submission of counsel for the Association was that in the absence of some amendment to the Report, "the Chief and Associate Chief Judges' salaries will be equal to that of the Senior Regional Judges, which is not appropriate given the differential and responsibilities, and that this would create an insufficient differential with the puisne Judges."

Counsel for the Government, in his reply to the Association's submission, submitted that further increases in administrative salaries, beyond the increases given in the Report, would not be appropriate. In particular, it was argued that there should not be parity with the Chief Justice and Associate Chief Justice of the Superior Court of Justice, when the Report itself did not award parity with judicial salaries for the Superior Court. As to the argument for maintaining the existing differential between the puisne Judge and the Chief Judge and Associate Chief Judges, the Government argued that what was awarded in the Report adequately recognized the responsibilities associated with those positions.

DECISION

For 1998, the existing differentials can be maintained so that the issue does not arise for that year. For 1999 and 2000, the Regional Senior Judges shall maintain their differential until such time as they are capped at the \$178,100 level. At such time as the \$178,100 cap would come into play for an Associate Chief Judge or the Chief Judge, the Associate Chief Judges shall be paid an administrative differential of \$5,000 above that cap, and the Chief Judge shall be paid an administrative differential of \$10,000 above that cap.

2. REPRESENTATIONAL COSTS

The second issue raised by counsel for the Association was that of representational costs. In the Report, we held that representational costs should be paid to the Judges in an amount to be determined. We directed that counsel for the parties attempt to agree on an appropriate cost figure and that if they could not so agree, we would remain seized of the matter and would hear submissions. Counsel for the Association asked for clarification with respect to the payment of representational costs. As the Report held that such costs were an appropriate allowance to the Judges, it might be thought to follow that the

allowance would be paid on a pro rata basis to the individual Judges and then by them to the Association. Counsel for the Association stated that it was the Association's preference that such an allowance be paid in the aggregate to the Executive of the Association, and through it to counsel rather than from each individual Judge to counsel.

Counsel for the Government argued, once again, that representational costs are not within the ambit of the term "allowance" as that term is used in Section 13(c) of the Framework Agreement. It was also argued that since Section 17 of the Framework states that the Commission may retain professional and support services, including counsel services, and is silent as to representational costs for the Judges, the award of representational costs is therefore not contemplated by the Framework and is beyond the jurisdiction of a Triennial Commission. Moreover, counsel also noted that the Framework was negotiated after 1988 when the Henderson Commission had declined to award representational costs.

We do not think that either of the points raised by counsel for the Government are determinative of the issue. The fact that Section 17 gives a Triennial Commission the power to retain professional and support services says nothing about whether representational costs may be awarded to the Judges as an allowance. Nor is it particularly relevant that the Framework was

negotiated after an earlier Commission had declined to award such costs. The Framework deals with "benefits and allowances" and as we said in the Report, and we would clarify now, we consider such representational costs to be an appropriate allowance for the Judges for all the reasons set out at pages 50-54 of the Report. A sum paid to the Judges once every third year to allow them to participate on an equal footing with the Government in a statutorily, and since the P.E.I. Reference, supra, constitutionally mandated hearing, is within the concept of an allowance - "an amount allowed esp. regularly for a stated purpose" (Oxford Dictionary of Current English, 2nd ed. 1993), as that term is used in Section 13(c) of the Framework.

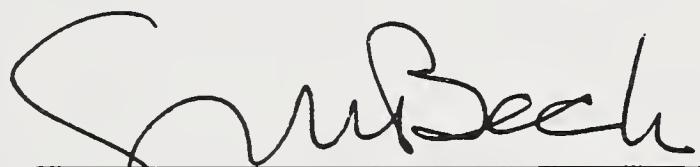
We see no reason why the order as to costs should not direct that that allowance be paid directly to the Executive of the Association rather than being paid in individual lump sums to over 200 Provincial Court Judges to then be passed on to counsel. There is no reason to handle the matter of an allowance for representational costs in such an inefficient manner.

In conclusion, we reaffirm our award of representational costs as being an appropriate allowance under Section 13(c) of the Framework and would direct that it be paid directly to the Executive of the Association once the amount has been determined.

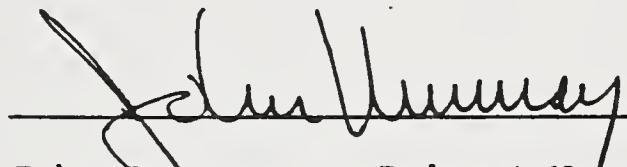
As Commissioner Gibbons dissented in the Report with respect

to both the matter of salary levels and the awarding of representational costs, she does not join in this clarifying majority award.

DATED at TORONTO this 30th day of June, 1999.



Stanley M. Beck, Chair



John C. Murray, Judges' Nominee

STANLEY M. BECK, Q.C.

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September 25, 2000

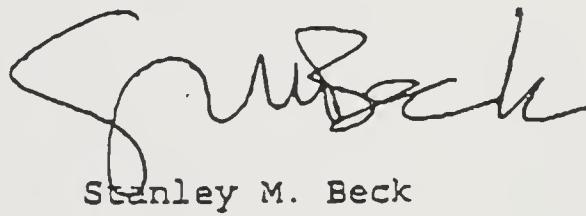
Chair
Management Board of Cabinet
12th Floor, Ferguson Block
77 Wellesley Street West
Toronto, Ontario
M7A 1N3

Dear Sir:

Re: Fourth Triennial Provincial Judges Commission

I enclose the majority judgment with respect to
Representational Costs in the above-noted matter.

Yours sincerely,


Stanley M. BeckSMB:lk
Enc.

cc: Secretary, Management Board of Cabinet
cc: Mr. John C. Murray
cc: Ms. Valerie A. Gibbons
cc: Mr. C. Michael Mitchell
cc: Ms. Frances R. Gallop

FOURTH TRIENNIAL REPORT OF THE
PROVINCIAL JUDGES REMUNERATION COMMISSION (1998)

ADDITIONAL REASONS - REPRESENTATION COSTS

FOURTH TRIENNIAL REPORT

ADDITIONAL REASONS - REPRESENTATION COSTS

1. Background

The Fourth Triennial Report of the Provincial Judges Remuneration Commission (1998) (the "Report") was delivered to Management Board of Cabinet on May 20, 1999. The Commission was constituted pursuant to the Courts of Justice Act, 1994, R.S.O. 1990, c. 43, s. 51.13, and the Framework Agreement (the "Framework") contained in Appendix A to the Act, which governs the terms of reference and jurisdiction of each of the Triennial Commissions. As we noted in the Report, it is the essence of the Framework that it deals with the relationship between the Executive Branch of the Government and the Provincial Court Judges ("the Judges"), including a binding process for the determination of the Judges' compensation. A Commission's recommendations with respect to salaries, benefits and allowances, but not pensions, "have the same force and effect as if enacted by the Legislature".

Section 13(c) of the Framework requires each Triennial Commission to recommend benefits and allowances, as well as salary. The Report concluded that "the representation costs of the Judges should be paid as an allowance by the Government for

each Triennial hearing". In so concluding, the Report indicated that it was following what it considered to be the dictates of the judgment of the Supreme Court of Canada in Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island (the "PEI Reference"), [1997] 3 S.C.R. 3, and of Roberts, J. in Re Judges of the Provincial Court of Newfoundland et al. and the Queen in Right of Newfoundland (1998), 160 D.L.R. (4th) 337, that "it would be fair, equitable and reasonable, in the context of this hearing under the Framework, that an allowance for costs be determined". Accordingly, we directed counsel for the parties to attempt to agree on an appropriate cost figure. If counsel could not agree, we stated that we would remain seized of the matter and would hear submissions as to costs.

2. Additional Reasons - June, 1999

Following issuance of the Report, counsel for the Ontario Judges' Association (the "Association"), pursuant to Section 28 of the Framework, sought amendment and clarification of the Report with respect to two matters - administrative salaries and representation costs. As to representation costs, counsel for the Association requested that any allowance for costs be paid in the aggregate to the Executive of the Association and through it to counsel, rather than from each individual judge to counsel.

Counsel for the Government took the opportunity to argue again that representation costs were not within the ambit of the term "allowance" as that term is used in Section 13(c) of the Framework. Moreover, it was argued that since Section 17 of the Framework states that the Commission may retain professional and support services but is silent as to representation costs for the Judges, an award of costs was not contemplated by the Framework and was therefore beyond the jurisdiction of a Triennial Commission.

In our Additional Reasons, we repeated that we considered representational costs to be an appropriate allowance for the Judges for all the reasons set out at pages 50-54 of the Report. We also concluded that there was no reason why a direct allowance should not be paid directly to the Executive of the Association, rather than being paid in individual lump sums to some 250 Provincial Court Judges to then be passed on to counsel. There was no reason to handle the matter of an allowance for costs in such an inefficient manner. As Commissioner Gibbons dissented in the Report as to salary levels and the awarding of representational costs, she did not join in the Additional Reasons.

3. Representation Costs

In the event, counsel could not agree as to an appropriate

amount for costs. Accordingly, the matter was submitted to the Commission for decision. The total of the legal, actuarial and other consulting fees, including disbursements, incurred by the Association, was \$667,914.49. A breakdown shows legal fees of \$558,891.27, including \$20,098.87 for disbursements. Consultants' fees, including disbursements of \$2,451.12, were another \$109,023.22. In arguing for full payment of the Association's costs, counsel cited the judgment of the Supreme Court of Canada in the Provincial Court Judges (No. 2) to the following effect:

The composition and the procedure established for hearings before the independent, effective and objective commission may vary widely. So will the approach to the payment of representational costs of the judges.... Suffice it to say, whatever may be the approach to the payment of costs, it should be fair, equitable and reasonable.

Counsel submitted that the fees and expenses of the Association met those three tests and should be reimbursed in full. More specifically, counsel argued that the issues involved in the case were of fundamental importance to the administration of justice in Ontario and that a broad range of issues were required to be canvassed, including the entire history of the compensation of the Judges. In that context, the work of many lawyers over a very substantial number of hours was justified "...to meet the onus of persuading the Commission to make a fundamental change in compensation policy".

To understand the reason for the relatively high level of the costs, it was necessary to appreciate the nature of the argument made in the case. Counsel for the Association expressed it as follows:

The position taken by the Judges that there should be equality of treatment as between provincially and federally appointed Judges had not been previously accepted through any adjudicative process. In order to accomplish that goal, it was necessary to undertake an extraordinary effort to marshal all of the historical, equitable and social policy reasons why that result was the proper result in all of the circumstances. In this regard, it was necessary to deal with the entire history of the treatment of the compensation of Provincial Court Judges, particularly in the last 30 years, and to deal extensively and respond to the reasoning and approaches of previous Triennial Commissions, as well as the many Commissions held in other provinces over the years. All of the previous reports of prior Ontario Commissions, the submissions of these parties to those Commissions in Ontario, the submissions of other Associations and governments in other provinces, the reasons of Commissions in other provinces, as well as the Federal Judicial Commissions, had to be analyzed, parsed, distinguished and/or marshalled in support of the important public policy position which was ultimately adopted by the Commission. Very importantly, detailed care and attention had to be paid to researching and explaining the increasing jurisdiction in criminal matters of Provincial Court Judges under the Criminal Code, including the evolution of case loads in both the Superior Court and the Provincial Court.

As to the use of experts, pensions are obviously a matter of great importance to the Judges, and counsel took the position

that it was necessary not only to understand and explain the existing Judges' pension plan, but also the history of the plan and the changes that have been made to it. It was argued that "complex alternate pension proposals had to be considered, formulated, costed, revised and explained". Similarly, a benefit consultant was retained to identify benefit options, alternatives and costs, and an economic consultant was engaged to deal with issues surrounding the state of the provincial economy.

In summary, counsel for the Judges argued that it was felt that the 1998 Commission was the time to make the case for equality of treatment with Judges of the Ontario Superior Court. The Ontario economy was robust, the Judges had not had a pay increase, other than the agreed cost-of-living increases, since 1991. Accordingly, a major review was undertaken. The fact that these efforts resulted in substantial success, although not parity, justified the approach taken. And it was an approach that necessarily resulted in costs that were of a considerable magnitude greater than the costs incurred in previous Triennial Commission hearings.

As to the relatively high level of costs, counsel contrasted the situation before this Commission with the case of the First and Second Triennial Commissions. As counsel noted, in those instances there were public hearings in the nature of an Inquiry or a Royal Commission, with submissions presented by many groups

around the province. The Commissions travelled and had administrative and research staff, including retained actuaries.

By contrast, there was not a large administrative burden on the current Commission as the overwhelming burden of the work was undertaken by the Association through its counsel and experts. In short, it was argued that the process before the Commission was more in the nature of an interest arbitration than a public inquiry. This meant that the research, documentation, arguments and policy considerations were set before the Commission by each of the parties. Accordingly, the Commission's direct costs were substantially less than previously and the parties costs, particularly those of the Association for the reasons noted, were appreciably higher.

4. THE GOVERNMENT'S SUBMISSIONS

The essential Government position was that it was not appropriate for the Government to pay all the costs associated with the Judges' participation in the process. It was only reasonable that the Judges should make some contribution to those costs. As the argument for the payment of representational costs was that the Judges should be able to participate on an equal footing with the Government, it follows that the Government should not have to pay for Judges' counsel at higher hourly rates

than those paid for lawyers representing the Government. Nor should the hours billed exceed those billed by the Government's lawyers. It was also instructive to consider how other Provincial Commissions have treated costs, as well as the recent decision of the Federal Judicial Compensation and Benefits Commission (the "Federal Commission"). The Federal Commission recommended that 80% of the Judges' costs be paid by the Federal Government to a maximum of \$230,000. In the case of other provincial commissions, the highest costs awarded had been \$160,000, with the others being far below that figure.

The Government's arguments, in somewhat more detail, were as follows:

1. The Government Should Not Pay All Costs Incurred By The Judges

Counsel particularly compared the Government's costs to those of the Judges. The legal and consultant costs incurred by the Government amounted to \$202,393.05 in total. Counsel acknowledged that the Government had access to internal resources with respect to actuarial expertise. Assuming it had to retain those services, \$80,250.58 was added to the Government's costs for a total notional amount of \$282,643.63. Applying some reduction for taxation principles, that figure would be reduced to \$262,580.98. That, it was argued, should be the maximum

amount for the Judges, as it would allow them to participate on an equal footing with the Government. That would leave \$405,533.51 to be funded by the Judges.

Counsel for the Government also quoted with approval the decision of the Federal Commission to the effect that "...some contribution should be made by the Judiciary to their overall representational costs, through an application of a portion of their membership fees in the Conference." As noted, the ultimate decision was that 80% of the Judges' total costs should be paid by the Federal Government.

2. Equal Footing Implies Equal Hourly Rates and Equal Number of Hours

It was argued that if the purpose of a representational allowance is to allow the Judges to participate on an equal footing with the Government, then it follows that the maximum hourly rate paid by the Government should be the maximum allowed for counsel retained by the Judges. Similarly, reimbursement for hours spent should not exceed the number of hours for which the Government paid its own lawyers. The Government paid its lawyers for a total of 705.5 hours, whereas the account submitted by counsel for the Judges was for 1594 hours' work. Accordingly,

it was argued that an appropriate amount would be "an allowance for legal costs that equals the amount paid by the Government for its legal services...to allow the Judges to participate in the Commission proceedings on an equal footing with the Government". If, as argued, the reimbursement for legal fees should not exceed the amount paid to Government lawyers, and applying taxation principles, the maximum allowance would be \$262,580.98.

3. Taxation Principles

It was argued that the taxation principles applicable in ordinary litigation should be applied here. It was the Government's submission that the end result would be the same. That is, if taxation principles were applied to the Judges' total bill of \$667,914.49, it would be reduced to \$262,580.98. The standard taxation principle in awarding costs is to grant an amount that partially indemnifies the adverse party ("party-and-party" cost assessment). Cost assessment is not intended to provide complete indemnification. Accordingly, certain items are "taxed off" by the Courts, and only costs which are "reasonably necessary" are allowed to stand. With respect to experts' costs, to be allowable those fees must be reasonable, reasonably incurred and reasonably

necessary. And the onus is on the claiming party to prove those elements.

4. Costs Paid in Other Canadian Jurisdictions

Counsel emphasized once again that the Supreme Court of Canada held in Provincial Court Judges (No. 2) that while each jurisdiction's approach regarding the payment of Judges' representational costs may vary, the approach taken must be "fair, equitable and reasonable". In determining whether the costs asked for meet that test, it is appropriate to examine the quantum of representational costs that have been reimbursed in other jurisdictions. In Alberta in 1998, Judges' costs were \$159,000 for counsel and \$75,700 for consultants, for a total of \$234,700. The Commission determined that the reasonable costs to be borne by the Government should be \$160,000. In reducing the bill, the Commission felt that some of the expert evidence was "largely of an advocacy character" and that some of the counsel participation also was more of an advocacy character rather than just providing the Commission with "unvarnished fact and opinion".

In Newfoundland, the Newfoundland Supreme Court held that the Government was obligated to provide funding for "adequate representation, subject to

"review by either a Taxing Master or a Judge of the Supreme Court of Newfoundland". In the case of British Columbia, Saskatchewan, Manitoba and Nova Scotia, the costs were all well under \$100,000, although no information was provided as to the extent of the proceedings in each case.

The only other significant award of costs referred to was that of the Federal Commission. The Federal judiciary's costs were \$270,000. The Federal Commission stated that it had "reviewed that breakdown [legal fees and disbursements and experts' costs] and all related particulars in detail" and concluded that the costs incurred were reasonable. The Federal Commission's decision was "that the Government should be responsible for payment of 80% of the total representational costs incurred....", such amount not to exceed \$230,000.

5. JUDGES' REPLY SUBMISSION

Counsel for the Judges argued once again that "the nature, breadth and complexity of the argument and the result all justify the increased amount of expenditure". Accordingly, in the particular circumstances, it was submitted that 100% of the Judges' costs should be borne by the Government. As to the

concept of "equal footing", it was argued that there was nothing either in principle or logic to limit counsel and the consultants representing the Judges to exactly the same hours of work as counsel for the Government, and at the same rate of pay. The complexity of the case and the nature of the argument may vary from Commission to Commission, and there was no necessary correlation between work done for the Judges as opposed to work done for the Government. The ultimate test, it was submitted, was "whether the work undertaken by counsel and consultants for the Judges was necessary or excessive in all the circumstances".

With respect to taxation principles, it was argued that the principles that are rooted in the adversarial system and the rules surrounding allocation of costs between parties where one party is successful in Court, have no application to the sort of public inquiry that takes place before a Triennial Commission. That process is one of public policy-making "adopted in the public interest, in order to facilitate and advance the interests of the proper administration of the system of justice in the Province of Ontario". In that light, it was argued, the only question for the Commission was whether the expenditures incurred "were necessary, proper and appropriate with respect to assisting the Commission in determining the issues before it".

6. DECISION

Having considered the arguments for the parties, we agree with the position taken by the Federal Commission. That is, we think it appropriate that the Judges pay a portion of their total costs. As with the Federal Commission, we think that 20% is appropriate in a case such as this. Accordingly, it is ordered that the Government pay 80% of the total costs and disbursements, including experts' fees, as submitted. That is, 80% of \$667,914.49, which is \$534,331.59. That would leave some \$133,582.90 to be paid by the approximately 250 members of the Association, or some \$534.00 each, which we regard as an entirely reasonable amount.

In reaching our conclusion, we are conscious that the costs incurred by the Judges in this case were far beyond what has been incurred in any other Federal or Provincial Judicial Commission. However, as submitted by counsel for the Judges, the nature of this case went quite beyond what had been presented before previous Triennial Commissions. As noted, the Judges' salaries, apart from cost-of-living, had been effectively frozen since 1991. The Judges felt that the time had come to review their position in the context of the Judiciary in Ontario, the changes that had taken place in their jurisdiction relative to the Judges of the Superior Court, and to review the entire history of their compensation. In short, it was felt that the time had come for a

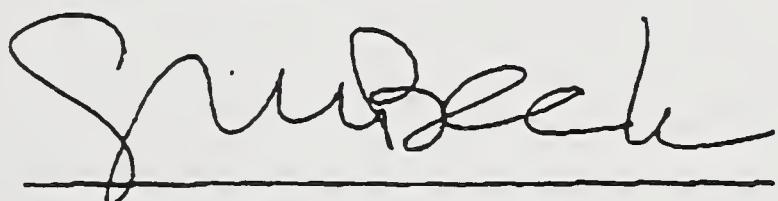
very extensive review of and, it was hoped, change in the economic position of the Judges in the judicial framework in Ontario. We agree with that position and would comment that we found the extensive evidence and written argument presented to be of great help in our deliberations. Indeed, we are conscious that our decision was a far-reaching one and was justified for all the social, economic and public policy reasons set out in our Report. In that context, we find that the costs incurred were fair and reasonable.

We do not think that the taxation principles of the adversarial process are appropriate to a review of the costs incurred in a public inquiry such as the one before the Fourth Commission. The test, as enunciated by the Supreme Court of Canada, is whether the costs incurred were fair, equitable and reasonable. In our opinion, they were. We reject the argument that "equal footing" must mean that the rates paid and hours worked by counsel for the Judges must be identical to those of counsel for the Government. There is no necessary correlation between the hours and the costs of the parties, and neither logic nor principle requires such a symmetry. To repeat, the essential test is one of reasonableness in all of the circumstances of the particular case.

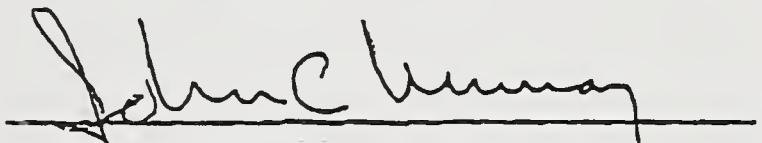
We award the Judges 80% of their total billed costs of \$667,914.49, to be paid by the Government to the Association.

As Commissioner Gibbons dissented in the Report with respect to both the matters of salary levels and the awarding of representational costs, she does not join in this Award with respect to representational costs.

DATED at TORONTO this 18th day of September, 2000.



Stanley M. Beck, Chair



John S. Murray, Judges' Nominee

